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SHDKT PROCEEDINGS AND ORDERS DATE: [12/08/95]

CASE NBR: [95100073] CFX STATUS: [DECIDED]
SHORT TITLE: [Cargill, Inc.]
VERSUS [United States] DATE DOCKETED: [071395]
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	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jul 13 1995	D	Petition for writ of certiorari filed.
2	Aug 14 1995		Brief amici curiae of American Forest & Paper Association, et al. filed.
4	Aug 15 1995		Order extending time to file response to petition until September 20, 1995.
8	Sep 19 1995		Brief amicus curiae of Pacific Legal Foundation filed.
5	Sep 20 1995	X	Brief amici curiae of National Association of Home Builders, et al. filed.
6	Sep 20 1995		Brief of respondent United States in opposition filed.
7	Sep 20 1995		Brief amici curiae of Mountain States Legal Foundation, et al. filed.
9	Sep 27 1995		DISTRIBUTED. October 13, 1995 (Page 1)
10	Sep 29 1995	X	Reply brief of petitioner filed.
12	Oct 23 1995		REDISTRIBUTED. October 27, 1995 (Page 21)
13	Oct 30 1995		Petition DENIED. Dissenting opinion by Justice Thomas.

PREVIOUS 1 1 EXIT

Last page of docket

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PREVIOUS 1 1 EXIT

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FILED

95-73 JUL 13 1995

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

CARGILL, INCORPORATED
a Delaware Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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13PP

QUESTIONS PRESENTED

1. Whether the purported extension of the Corps of Engineers' regulatory jurisdiction under the Clean Water Act to reach non-navigable isolated waters solely on the ground of their use by migratory birds oversteps the bounds of the Commerce Clause.

2. Whether the "migratory bird rule," at least as applied to the exercise of regulatory authority over very shallow, non-navigable seasonal "ponds" wholly unconnected to any other body of water, is invalid as inconsistent with any reasonable construction of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*

3. Whether, if it is authorized by statute, the "migratory bird" rule, at least as applied here, is ineffective because it was never offered for public comment as required by the Administrative Procedure Act, 5 U.S.C. § 533.

4. Whether a court is required to assess a civil penalty in every case in which it finds a violation of the Clean Water Act.

PARTIES BELOW

In addition to the parties named in the caption, defendants in the District Court and appellants in the Court of Appeals included the then Secretary of the Army (John O. Marsh), Chief of Engineers (Lt. Gen. E.R. Heiberg), and District Engineer for the San Francisco District of the Corps of Engineers (Lt. Col. Andrew M. Perkins), all sued in their official capacity. Intervenors in the District Court and appellants in the Court of Appeals were The Save San Francisco Bay Association, a non-profit California corporation, and National Audubon Society, a non-profit New York corporation. Leslie Salt Co., the original plaintiff (and defendant in the Government's enforcement action) was a wholly-owned subsidiary of Cargill, Incorporated that was merged into Cargill, Incorporated on September 1, 1991.

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UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Cargill, Incorporated, a Delaware Corporation, petitions this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on May 22, 1995.

OPINIONS BELOW

The opinions of the Court of Appeals accompanying the judgement from which review is sought are not yet reported (App. A, *infra*). The most recent opinions of the District Court are reported at 820 F. Supp. 478 (N.D. Cal. 1992) (App. C, *infra*). The opinions of the Court of Appeals on the first appeal are reported at 896 F.2d 354 (9th Cir. 1990) (App. D, *infra*). The order of this Court denying the first petition for certiorari is reported at 498 U.S. 1126 (1991)

(App. G, *infra*). The initial decision on the merits of the District Court is reported at 700 F. Supp. 476 (N.D. Cal. 1989) (App. E, *infra*). An earlier opinion of that court on a procedural matter is reported at 660 F. Supp. 183 (N.D. Cal. 1987).

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution, of the Administrative Procedure Act, of the Clean Water Act and of the implementing regulations of the U.S. Army Corps of Engineers are reproduced in Appendix H hereto.

STATEMENT

Except for the description of the rulings below (part "C", *infra*), we are entirely content to adopt the statement of the case given by the court of appeals in its recent opinion. Accordingly, with only an occasional footnoted addition, we quote verbatim the relevant portions of that opinion (*see* pp. A-2 to A-5, *infra*).

"Cargill, Inc., the corporate successor to Leslie Salt Co., owns a 153-acre tract of land southeast of San Francisco. The property abuts the San Francisco Bay National Wildlife Refuge and lies near Newark Slough, a tidal arm of San Francisco Bay. A road divides the property into a 143-acre parcel and a 10-acre parcel. Until 1959, Leslie Salt used the property for salt manufacturing. The eastern part of the 143-acre parcel still contains pits that were used to collect

calcium chloride, and the western part contains shallow basins that were used for crystallizing salt.

"This appeal centers on 12.5 acres out of the 143-acre parcel, on which the former crystallizers and calcium chloride pits still lie.[1] During much of the year, these areas are dry. During the winter and spring, however, rainwater creates temporary ponds. Migratory birds use these ponds for habitat.[2] The dispute in this case began in 1985, when Leslie Salt began digging a feeder ditch and a siltation pond on its property and began discharging fill that affected the seasonally ponded areas.

A

"Under the Clean Water Act ('the Act'), the discharge of any 'pollutant' — which includes dredged or fill materials — into 'navigable waters' is forbidden unless authorized by a permit issued by the Army Corps of Engineers (the 'Corps'). 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). 'Navigable waters' is defined in the Act as 'waters of the United States.' 33 U.S.C. § 1362(7). The Act provides no further guidance as to what these terms encompass. The Corps has promulgated regulations defining 'waters of the United States' as:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> * * *
>
> (3) All *other waters* such as intrastate lakes, rivers, streams (including intermittent streams), mudflats,

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[1] The present petition concerns this same acreage. Originally, the Corps claimed jurisdiction over some 110 acres. *See* note 3, *infra*.

[2] *See* note 4, *infra*.

sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, *the use, degradation or destruction of which could affect interstate or foreign commerce* including any such waters:

> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are or could be used for industrial purposes by industries in interstate commerce;

33 C.F.R. § 328.3(a) (emphasis added). *See also* 40 C.F.R. § 230.3(s)(3) (EPA's identical definition).

"In the preamble to the 1986 regulations, the Corps suggested that 'waters of the United States' also includes waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species; or
>
> d. Used to irrigate crops sold in interstate commerce.

51 Fed. Reg. 41,217 (1986). This preamble material has never been subjected to notice-and-comment procedures and has not been promulgated as an official regulation. The predicate for jurisdiction over the seasonally ponded areas still in dispute in this case is their status as 'other waters' which are used as habitat by migratory birds.

B

"Upon learning that Leslie Salt was discharging fill that affected the seasonally ponded areas, the Corps issued a cease and desist order under section 404 of the Act. Leslie Salt filed suit challenging the Corps' jurisdiction over the property. The United States also brought an enforcement action, which was consolidated with Leslie Salt's suit.[3]

"The district court originally held that the Corps had no jurisdiction over Leslie Salt's property. *Leslie Salt Co. v. United States*, 700 F. Supp. 476 (N.D. Cal. 1989) ('*Leslie Salt I*'). On the issue that is currently before this court, the district court held that the temporary ponds in the crystallizers and the pits were not 'other waters' under 33 C.F.R. § 328.3(a)(3), because they had been artificially created and were dry much of the year.

"On appeal, [the court of appeals] reversed and remanded. *Leslie Salt v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) ('*Leslie Salt II*'). The court held, among other things, that the fact that the crystallizers and pits were artificially made and dry part of the year did not exclude them from being 'other waters.' *See id.* at 359-60. The court also held that '[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species.' *Id.* at 360. The court thus reversed and remanded for a factual determination of which parts of Leslie Salt's property had sufficient connections to interstate

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[3] At the time, the Corps claimed jurisdiction over some 110 acres of the property, almost entirely on the basis that they constituted "adjacent wetlands." Except for some nine acres, long removed from contention, the wetland claim was rejected by the District Court on the basis of factual findings and was abandoned by the Government on the first appeal. From that point, the "other waters" claim came to the fore.

commerce to be subject to the Corps' jurisdiction under the Act.

"On remand, the district court found that roughly 12.5 acres of seasonally ponded areas, primarily in the calcium chloride pits, were subject to jurisdiction. *Leslie Salt Co. v. United States*, 820 F. Supp. 478 (N.D. Cal. 1992) ('order for judgment') ('*Leslie Salt III*'). The court justified this holding by referring to the evidence summarized in the United States' Memorandum on Remand. *See id.* at 480. Among other things, this Memorandum states that some 55 species of migratory birds use the seasonally ponded areas as habitat.[4] The court also held that Leslie

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[4]The statement regarding 55 species of migratory birds using the seasonally ponded areas is misleading. Even assuming the District Court meant to endorse all the representations in the Government's Memorandum (which is doubtful, given the very limited contest on remand), it should be stressed that many of the sightings recited there are of *upland* birds, not associated with water; some of the visits were to areas *not* in dispute; and most were too occasional and erratic to justify terming the site visited a meaningful "habitat."

Moreover, the true picture is very much more modest than the Memorandum suggests. Accepting the evidence of the Government's own expert who studied the site in the winter of 1986-1987, the average number of the most prevalent species of waterfowl or waterbirds (the mallard and the least sandpiper) seen at one time during the relatively wet month of March on the entire 153-acre property was *less than 12 birds* of each kind. Exh. 541, Table 1. For the next most frequent such visitor, the killdeer, the comparable figure was 3 birds, and for the nine other species of water-associated birds, the *greatest* number ever spotted on one visit was *five* specimens. *Ibid.* In fact, it appears only one ruddy duck, one cinnamon teal, and one greater scaup was seen, once each, during the entire 1986-1987 winter, and then only at one location. Exh. 541 at 4 and Table 1. Except for sandpipers, the figures are not significantly greater in March 1985 — before any arguable violation by Cargill. Exh. 541, Table 1. Finally, it was said to be likely that at least some of these birds were strays or "day-trippers" from the adjacent refuge (Tr. 1263) and that in the "Mediterranean" climate of the Bay Area, some species (notably the mallard, northern pintail and cinnamon

Salt violated the Act in three of these areas by discharging fill or altering structures without a permit at specific points. Finally, in proceedings addressing the issue of remedies, the court ruled that penalties are mandatory under section 309(d) of the Act when a violation has been found, and that the United States was entitled to injunctive relief to restore the property to its preexisting condition. *See id.* at 483-84 ('order regarding remedies').[5] The parties subsequently stipulated to a penalty of $50,000 and a restoration plan. The stipulation preserved Cargill's right to appeal the issue of whether penalties are mandatory."[6]

C

On the second appeal, a differently constituted panel of the Ninth Circuit affirmed (App. A, *infra*). Except on the penalty issue (Question 4, *supra*), however, it did so by applying the doctrine of the law of the case. In the panel's view, it could not reconsider the prior decision even if persuaded that it was wrong, so long as it was not "*clearly* wrong." Pp. A-7 to A-8, *infra* (emphasis added).

Following this unusual standard for questions of law, the court proceeded to discuss each of the issues identified here as Questions 1-3, *supra*. As to the administrative law point (Question 3), the panel expressed its ambivalence about the

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teal ducks and the killdeer) often do not in fact migrate out of state. *See* Exh. 597 at 5 and Table 1 at 2, 6. *See also* L. & J. Westrich, *Birder's Guide to Northern California*, xv-xvii, 108, 273, 275, 278 (1991); National Geographic Society, *Field Guide to the Birds of North America*, 15, 22, 52, 54, 68, 72, 74, 76, 102, 106 (2d ed. 1987).

[5]Although published together (App. C, *infra*), the District Court's opinion on the merits ("Order for Judgment," entered Jan. 6, 1992), and its opinion on the remedy issues ("Order Regarding Remedies," entered July 22, 1992), were delivered more than six months apart.

[6]This stipulation is incorporated in the District Court's Final Judgement, entered April 26, 1993 (App. B, *infra*).

right result, but concluded that it was "plausible" to find that the migratory bird rule was "merely an interpretive rule, and thus not subject to the notice-and-comment requirements of the Administrative Procedure Act." P. A-10, *infra*. Similarly, in dealing with Question 2, *supra*, the court opined that "Cargill's arguments might well deserve closer consideration" if the issue were being presented for the first time, but that their earlier rejection was not "clearly erroneous." Pet. App. at A-12. And like treatment was given to the contention that the migratory bird rule overstepped the boundaries of the Commerce Clause (Question 1). It was acknowledged that the rule "certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason"; yet, the court concluded that the prior ruling denying the constitutional challenge "cannot be considered clearly erroneous." P. A-14, *infra*.

On the mandatory penalty issue (Question 4, *supra*), the court below divided. Essentially on the basis of precedent elsewhere, the majority approved the District Court's ruling that a monetary penalty *must* always be imposed when a violation of the Clean Water Act is found. Pp. A-15 to A-17, *infra*. Judge O'Scannlain dissented on this issue, pointing to dicta in this Court and in the Sixth Circuit and legislative history suggesting that penalties are discretionary, and concluding that the statutory language "shall be subject to [penalties]" is *not* equivalent to "shall pay." Pp. A-17 to A-19, *infra*.

REASONS FOR GRANTING THE WRIT

The present case is before the Court for the second time. On the prior occasion, certiorari was denied, with one recorded dissent. *Leslie Salt Co. v. United States*, 498 U.S. 1126 (1991). Since then, however, several things have changed, combining, we submit, to tilt the balance in favor of granting the writ.[7]

1. First is this Court's decision in *United States v. Lopez*, No. 93-1260 (Apr. 26, 1995), which undermines the holding below insofar as it sustains the constitutionality under the Commerce Clause of the so-called "migratory bird rule"— extending Clean Water Act regulatory jurisdiction to wholly intrastate seasonally ponded areas that are isolated from any interstate water body and have no arguable connection with interstate commerce except only their occasional use by birds that cross State lines. Conceivably, the Court might vacate the decision below and remand the case for reconsideration in light of *Lopez*. But, for two reasons, we urge against that course.

The fact is that the court of appeals' decision was rendered some four weeks *after Lopez*, which we expressly brought to that court's attention. Thus, even though *Lopez* is not mentioned in the opinion, we must assume the court of appeals considered it. There is, moreover, a stronger reason for eschewing a remand in the present context. It is that under the rule counselling avoidance of constitutional adjudication where fairly possible, the court of appeals presumably should not decide the *Lopez* question, at least directly.[8]

2. The second changed circumstance is the unusual tenor of the recent opinion below. Under the constraint of

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[7] Needless to say, the earlier denial of certiorari is not a jurisdictional bar to the grant of the present application. *E.g.*, *Mercer v. Theriot*, 377 U.S. 152, 153-154 (1964); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 672 n. 19 (1979). *Cf. Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 881 n. 1 (1990); *Christiansen v. Colt Indus.*, 486 U.S. 800, 817-818 (1988).

[8] Arguably, on a remand the court of appeals might view *Lopez* as introducing a new constitutional doubt that altered the legal climate so as to require setting aside the law of the case obstacle and reconsidering *de novo* the statutory question (Question 2, *supra*).

the law of the case doctrine, the present panel declined to reconsider the earlier decision unless it could be shown "not only that the *Leslie Salt II* court's holding regarding the migratory bird rule was wrong, but that it was clearly wrong." Pp. A-7 to A-8, *infra*. The panel then proceeds to suggest that each of the earlier rulings on the issues presented here as Question 3 (*see* pp. A-9 to A-10, *infra*), Question 2 (*see* p. A-12, *infra*), and Question 1 (*see* p. A-14, *infra*), was quite possibly wrong, but not "clearly" so. The result is most unsatisfactory and strongly invites resolution by this Court which, of course, is not bound by any law of the case announced in a lower court. *See* n.7, *supra*.

3. Third, there is now, as was not true before, a square and persisting conflict between the Fourth and Ninth Circuits on the important administrative law question whether the migratory bird rule could be made effective without public notice and opportunity for comment in accordance with the Administrative Procedure Act, 5 U.S.C. § 553 (Question 3, *supra*). In 1990, it was not entirely clear whether the court of appeals had considered the issue (the opinion being silent) and whether, in any event, the Government would moot the point by offering the migratory bird rule for notice and comment, as promised in a Joint Memorandum of the U.S. Army Corps of Engineers and the Environmental Protection Agency. *See* No. 90-792, Pet. App. A-46 to A-49. Today, five years on, no rulemaking having been announced and the court below having expressly stated that the point *was* decided (p. A-8, *infra*), it is plain the decisional conflict and the differing legal regimes in the Fourth and Ninth Circuits are to continue indefinitely unless this Court intervenes.

4. Fourth, there is no longer any basis for viewing the decision of the court of appeals as "interlocutory" and not sufficiently "final" or "ripe" for review in this Court. *See*

No. 90-792, Br. of Fed. Resp. in Opp. 8-9. At the 1990 Term, the Government opposed our Petition with heavy reliance on such representations, claiming that "it would be premature to consider the [validity of the migratory bird rule] here, where the applicability of the regulation has not yet been decided," and that "proceedings on remand [to the district court] might . . . greatly clarify the interests at stake and similar cases and the precise application of the Corps' regulations in this setting . . . and might [even] moot this case." *Id.* at 20. So far as that ground of opposition weighed with the Court, it is no longer present.

Whatever doubts may have existed about the practical impact of the migratory bird rule are resolved by the specific application of the rule to portions of petitioner's property which, as the court below noted, are merely "seasonally ponded areas" that "have no hydrological connection to any other body of water" and which "for much of the year . . . do not even exist." P. A-12, *infra*. *See also* p. A-1, *infra* ("isolated, seasonally dry interstate waters used only by migratory birds"); p. A-2, *infra* ("During much of the year, these areas are dry. During the winter and spring, however, rainwater creates temporary ponds."). What is more, the migratory birds whose visits were deemed sufficient included many that were in no sense *water birds*, but simply common upland birds coming to drink or rest. Revealed in all its breadth, the migratory bird rule encompasses tens of millions of acres not otherwise within the reach of the Clean Water Act.[9] Whether such a huge extension of regulatory

[9]The present case involves isolated temporary ponds that do not qualify as "wetlands" but were held to constitute "other waters" under the Corps' Clean Water Act regulations. The more usual case invoking the migratory bird rule will be that of isolated wetlands. It has been estimated that there are some 90 million acres of "palustrine" freshwater wetlands within the continental United States, not including Alaska. *See* Frayer, et al., *Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950's to 1970's*, 3, 20-21,

jurisdiction is validly accomplished plainly is of enormous importance to landowners throughout the Nation. This was a question expressly reserved by this Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 n.2, 131 n.8 (1985). It is now fully ripe for decision here.

5. Finally, there is now a new issue: whether the judicial imposition of a monetary penalty is mandatory upon a finding that the Clean Water Act has been violated, regardless how minor the infraction (Question 4, *supra*). The question only emerged after remand to the district court, which answered it in the affirmative, as did the court below in a divided decision. This issue of obvious recurring importance has created a conflict in the courts (*see* p. A-18, *infra*), and the holding below is at odds with *dicta* in this Court (*see* p. A-19, *infra*). Accordingly, the penalty question independently merits review here.

A. The Constitutional Question

The court below expressly found that, if authorized by the Clean Water Act, the migratory bird rule is within the power of Congress under the Commerce Clause. In its first opinion, the Court of Appeals simply asserted without discussion that "[t]he commerce clause power . . . is broad

22-23 (Apr. 1983); U.S. Fish & Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* vii, 5, 9, 28, 29 (Mar. 1984). Unlike "marine," "estuarine," "lacustrine" and "riverine" wetlands, palustrine wetlands are not typically associated with any "deepwater habitat." Frayer, *Status and Trends, etc., supra*, at 12-13; USF&WS, *Wetlands of the United States, etc., supra*, at 9-11. Thus, we may assume that a large part of the 90 million acres is isolated from any navigable waterway. To these wetland acres in the lower 48 must be added substantial areas of isolated wetlands in Alaska (presumably an important share of Alaska's estimated total of 200 million acres, USF&WS, *Wetlands of the United States, etc., supra*, at 28), and some in Hawaii, as well as isolated non-navigable "rivers, streams, . . . mudflats, sandflats, . . . sloughs, prairie potholes, [and] wet meadows" elsewhere that do not constitute wetlands but attract migratory birds.

enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds." *Leslie Salt II*, 896 F.2d at 360, p. A-50, *infra*. In its most recent decision, although conceding that "[t]he migratory bird rule certainly tests the limits of Congress' commerce powers and, some would argue, the bounds of reason," the court declined to reconsider its previous holding, which was deemed not "clearly erroneous" and therefore binding as the law of the case. Pet. App. at A-14. The result, we submit, is in conflict with this Court's decision in *United States v. Lopez*, No. 93-1260 (Apr. 26, 1995).

1. As in *Lopez*, the prohibition in suit has nothing directly to do with interstate commerce. The discharger may be a local landowner with no interstate connection and his actions may have no commercial purpose. By hypothesis, the "waters" involved are entirely intrastate, are isolated from any interstate waterbody, and serve no interstate function. They are regulated solely on the basis of their use by migratory birds. Yet, obviously enough, the self-propelled flight of birds across State lines is not itself interstate commerce. Indeed, when that proposition was last tentatively vented here, it was laughed out of Court. See Tr. of Oral Arg. 21-22 in *United States v. Riverside Bayview Homes*, No. 89-701 (October 16, 1985).[10] Accordingly,

[10]Contrary to the opinion below (p. A-16, *infra*), there is no suggestion in *Hughes v. Oklahoma*, 441 U.S. 322 (1979) — or any other case in this Court — that fish swimming under their own power across a state boundary, or birds in free flight crossing an interstate line, are engaged in commerce between the States. *Hughes*, like *Maine v. Taylor*, 477 U.S. 131 (1986), and *Andrus v. Allard*, 444 U.S. 51 (1979), involved the *man-initiated* transportation of captive species for commercial purposes. *See also Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), where the Court spoke of the movement of *vessels* from one state to another in search of fish, and back again to processing plants as an activity which Congress could conclude affects interstate commerce. *Id.* at 282 (emphasis added).

local activity that bears on such bird migration — even if adversely (not a showing required under the migratory bird rule or attempted here) — is not within the reach of the Commerce Clause unless some true interstate commerce can be shown to be "substantially affected" by the challenged activity. *Lopez*, slip op. at 10. As in *Lopez*, that finding cannot be made here without "pil[ing] inference upon inference." *Id.* at 19.

2. The present case, in fact, is more estranged from the concerns of the Commerce Clause than *Lopez*. It was there stressed that possession of a gun in a school zone was not itself economic activity and was a matter traditionally left to State regulation. *Id.* at 10-12, 16. So here. But, whereas in *Lopez* the guns themselves had already been articles of commerce (*see* Dissent of Stevens, J., slip op. at 1), the same cannot be said of the birds that come to the acreage in suit. Even if some ducks, at another site, eventually become commercial goods, most migratory birds either have no commercial value or are protected species. And, in any event, the migratory bird rule does not depend on the "commercial" character of the avian visitors.

So, also, the potential link with interstate commerce is even more remote in our case. In *Lopez*, it was indisputable that gun-related violence on school premises inhibits education and that impaired education has economic consequences. Yet that connection was deemed constitutionally insufficient. *Id.*, slip op. at 17-19. Here, it is more difficult to trace *any* significant effect on interstate commerce.

To be sure, it has been said that "millions of people annually spend more then a billion dollars on hunting, trapping, and observing migratory birds." P. A-13, *infra*, quoting *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993). But, assuming the correctness of that statement, it does not arguably justify the indiscriminate migratory bird rule. As already noted, most migratory birds

are either of no interest to hunters and trappers or are protected from them. And only a few species, we may surmise, attract out-of-state bird watchers. Moreover, we have no evidence that the population of any commercial species would be reduced by the non-regulation of wholly isolated waters, as opposed to wetlands adjacent to interstate or international waterbodies.

3. Here, even less than in *Lopez*, is there any room for argument based on "cumulative effects." As the court below acknowledged, "[i]n this case, there is no evidence of human contact with the seasonally ponded areas." P. A-14, *infra*. And, given the immediate proximity of the huge wildlife refuge abutting San Francisco Bay, it is reasonable to conclude that filling the very few acres of occasionally watered parcels in suit would have no measurable effect on the birds. In sum, the migratory bird rule, as applied here, reaches well beyond the zone of activity that affects interstate commerce and a multiplication of such instances cannot bring the case within the Commerce Clause. A thousand naughts still equals zero.

For better or for worse, the migratory bird rule, like the Gun-Free School Zones Act involved in *Lopez*, "contains no jurisdictional element which would ensure, through case-by-case inquiry," that the filling of particular isolated waters "affects interstate commerce." *Lopez*, slip op. at 13. Nor can such a requirement be read into the rule, given the unambiguously broad sweep of its language. *Ibid.* The migratory bird rule does not require a "commercial" bird that may, after capture, become an object of "commerce between the States." Nor does it depend on interstate *human* travellers (whether hunters, scientists, or bird watchers). If it were otherwise, there would be no need to restrict coverage to migrating birds which cross state or international boundaries. Plainly, the theory of the migratory bird rule — however extravagant — is that the interstate or international

flight of the birds is both necessary and sufficient to satisfy the Commerce Clause.

4. Finally, as in *Lopez*, the Court cannot rely on legislative findings to discern a substantial link with interstate commerce, "even though no such substantial effect [is] visible to the naked eye." *Lopez*, slip op. at 14. In this instance, moreover, we cannot safely assume that Congress ever made the required finding, albeit silently. For, unlike the statute in *Lopez*, neither the text nor the legislative history of the Clean Water Act remotely suggests that the migratory bird rule was contemplated. See pp. 17-21, *infra*.

In sum, the migratory bird rule — at least as applied here — overreaches the boundaries of the Commerce Clause as defined in *Lopez*. On this basis, the Court could strike it down. But, in the present case (unlike *Lopez*), there are non-constitutional grounds for invalidating the rule and, applying the imbedded principle of avoiding serious constitutional questions where possible (*see Lopez*, slip op. at 13), the Court presumably will wish to consider those alternative arguments, to which we now turn.

B. The Statutory Question

Our primary submission is that the migratory bird rule is inconsistent with any reasonable interpretation of the Clean Water Act. We believe that contention should prevail even if the power of Congress to enact the bird rule were clear. But, of course, that result is even more strongly compelled by what must be, at the least, a serious doubt as to the constitutional validity of the rule. In such circumstances, the Court has always strained to read the statute before it so as to avoid the constitutional question. *See Lopez*, slip op. at 13 and cases there cited. Here, no one dare claim that Congress has issued a "clear statement" authorizing the migratory bird rule; on the contrary, the statutory language (as well as its legislative history and its administrative

construction in the first dozen years) leaves it entirely open to construe the Clean Water Act as not intending to reach non-navigable, isolated waters solely on the basis of their use by migratory birds. Indeed, we submit any other reading is unreasonable.

1. We first look to the *statutory text*. The Clean Water Act prohibits discharges into "navigable waters." Obviously, the site in suit is not arguably navigable itself; it is not navigable now, it never has been, and it never will be. Nor is the site in any sense part of a navigable water system. Unlike, *e.g.*, an "adjacent wetland," it is not the non-navigable "edge" of a navigable waterbody; it is not a tributary of a navigable waterway; it is not even a remote "pocket" or "arm" or "finger" of a navigable waterbody. As the court below acknowledged (p. A-12, *infra*), the site is wholly *unconnected* to any navigable water; it is, in the terms used in the regulations, an "isolated water."

That would be the end of the case if the Act did not contain a somewhat odd definition, telling us that "navigable waters" means "waters of the United States." As the Court in *Riverside* remarked, this makes clear that the initial reference to navigability is of "limited import." *Riverside*, 474 U.S. at 133. But "*limited* import" is not *no* import. All the Court did in *Riverside* was condone a Corps assertion of jurisdiction over the *edge* of a plainly navigable waterbody, its *adjacent* wetlands, while twice pointedly distinguishing and expressly declining to approve the Corps regulations extending jurisdiction to *isolated* waters and wetlands, like the site involved here. *Id.* at 124 n.2, 131 n.8.

What does "waters of the United States" mean? Contrary to the Government's persistent claim that the term is entirely open-ended, "waters of the United States," or a similar phrase, has a history in federal statutes and has been used to include the non-navigable "adjuncts" of a navigable waterbody, such as non-navigable pockets or edges, or

tributaries;[11] but not wholly isolated non-navigable waters. And, less than a decade before our 1972 enactment, this Court had accepted as self-evident that the statutory expression "streams . . . over which Congress has jurisdiction under its authority to regulate commerce" reached no further than "tributaries of river systems necessitating supervisory power to preserve or improve downstream navigability or water commerce generally." *Federal Power Comm'n v. Union Electric Co.*, 381 U.S. 90, 97 (1965). *See also id.* at 97 n.9.

This is the natural meaning of the provision in the present context. Indeed, why refer to "navigable waters" at all if, by later definition, the idea of navigability is to be abandoned altogether? We must gi e Congress credit for avoiding the nonsense, or the deception, of writing "navigable waters" when it meant to embrace waters with not the remotest connection to a navigable waterbody.

It is said the Clean Water Act is concerned with pollution, a problem not limited to navigable waters and their "adjuncts"; and, moreover, that the Act expresses a concern for *wildlife*, which also frequents isolated, non-navigable waters. *See* p. A-11 *infra*. But this does not answer our point. Ignoring the limitations of the text in the name of furthering broad declarations of purpose does not effectuate the intent of Congress. *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986). More often than not, the legislative solution to a problem involves a compromise, deliberately limiting the means authorized in achieving a general goal.

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[11] *See, e.g.*, Rivers and Harbors Act of 1894, § 5, 33 U.S.C. § 499; Act of Feb. 19, 1895, § 2, 33 U.S.C. § 151; Rivers and Harbors Act of 1899, § 10, 33 U.S.C. § 403; Act of Sept. 15, 1922, 33 U.S.C. § 472; Act of June 22, 1936, § 1, 33 U.S.C. § 701(a).

Thus, here, Congress could well have been focussing on navigable waters and their tributaries because these are the waters impressed with a *national, federal* interest. Activities there are within federal jurisdiction, as *Federal Power Commission v. Union Electric* explains, since those waters implicate the federal navigational servitude under the Interstate and Foreign Commerce Clauses. As to these "federal" waters, Congress was, of course, not primarily interested in assuring their navigability. Rather, it was intent on keeping them clean, or making them cleaner — for the benefit of the fish, the waterbirds, and the people who enjoy them. These concerns justify reading "waters of the United States" to reach the non-navigable *adjuncts* of "federal" waters, because pollution of such "edges" or "pockets" or tributaries, would pollute the navigable waterbody itself. But, unconnected, isolated waters obviously do not have that effect.

If Congress had meant to reach isolated, non-navigable waters whose use "affects" interstate commerce, it knew the formula — well established before 1972. *See, e.g.*, § 201(b) of Civil Rights Act of 1964, 42 U.S.C. § 2000a(b) construed in *Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). The Court ought not rewrite the Clean Water Act to reach "all waters whose use may affect interstate or foreign commerce." That definition easily could have been given. It was not, and it cannot be added now.

2. The *legislative history* of the Clean Water Act confirms our submission. In all the thousands of pages leading to the 1972 amendment, isolated waters are not once mentioned — whether by Members of Congress, Executive Department officials, State representatives, potentially affected landowners, environmental groups, or other witnesses. The Government has never produced a single such reference and the opinion below accepts that none is to be found. P. A-11,

infra. Yet the issue implicates millions of acres. It would hardly have been passed in silence.

The legislators wrestled with the question of defining "navigable waters" and ultimately left the reach of the law somewhat vague. They wanted to avoid a "narrow" or "traditional" definition. But no one remotely suggested simply *altogether abandoning* any tie to navigable waters. We need not surmise whether the legislators believed to do so would overstep constitutional boundaries, or would stray beyond the proper scope of federal legislation, or would expose the Government to "taking" claims. What is clear is that they did not dream they were reaching isolated potholes, much less shallow, temporary and isolated accumulations of rainwater. If that had been proposed, *some* legislators, at least, predictably would have questioned the propriety or the constitutionality or the expense of going so far.

But, it is insisted, the legislative history of the 1972 Act reflects Congress' intent to "go to the constitutional limit." See p. A-11, *infra*. That is a false reading. What was, in fact, said, was that Congress intended "*the term 'navigable waters'* be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972) (emphasis added); *see also*, 118 Cong. Rec. 33699 (1972) (statement of Sen. Muskie). That is a very different thing. The concept of "navigable waters" *does have* a constitutional dimension, under the Admiralty Clause, for the purposes of the Equal Footing Doctrine, and as defining the scope of the federal navigational servitude. This last is presumably the most relevant, and it is the subject of the Court's cases cited in the debates.

This is *not* a statement that Congress was exercising to the full all its Commerce Clause powers — which, of course, are not limited to water. The Government has consistently overstated what Congress actually said and sometimes has

successfully misled a court. But it is notable that its effort to do that in this Court in the *Riverside* case failed. The Court there did *not* rest its decision on the easy proposition that the Clean Water Act meant to reach to the constitutional limit.

Looking to what was said in 1977, when the relevant provision of the statute was not amended, is a poor guide to what was meant by those who wrote the Clean Water Act five years earlier. It *was* then agreed, on all sides, as this Court noted in *Riverside*, 474 U.S. at 135-139, that the law reached *adjacent* wetlands. Invoking the 1977 debates as to *that* point, which was universally accepted, does not justify looking to 1977 on the very different, and far from agreed, proposition that *isolated* waters and wetlands were included. But, in any event, there was in 1977 no Congressional reference to anything remotely resembling the migratory bird rule of today.

3. Invocation of *administrative construction* does not advance the Government's case. Of course, deference to the interpretation of a statute by those charged with administering it is normally appropriate. As *Riverside* holds, this principle applies to the Corps' interpretation of the Clean Water Act. *Riverside*, 474 U.S. at 131. But it is unavailing in the present context.

The deference due is substantially diminished, if not eliminated, when, as here, the Corps' interpretation comes 13 years after enactment and involves a change of position that does not result from careful reconsideration based on experience, but is forced on the agency by the relentless pressure of two powerful Senators. That is the present situation, as a reading of the 1985 Subcommittee Hearings at which the migratory bird rule was invented, will attest. *See Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public*

Works, 99th Cong., 1st Sess. (1985) ("1985 Oversight Hearings"), especially at 114-116, 122, 129, 156-157, 160, 168-169, 169-171, 171-172, 193-194, 200, 205, 207, 208-209. *See also Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D.Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

In any event, the rule of deference only requires acceptance of a *reasonable* interpretation when the statute itself is *ambiguous*. Here, we submit, the text of the Clean Water Act, read in the light of its legislative history, does *not* leave us uncertain whether Congress meant to reach anywhere near as far as the migratory bird rule would take us. There is, accordingly, no room for administrative construction on this point. And, in any event, the migratory bird rule is not a *reasonable* interpretation of the intended reach of the statute.

4. It should be added that, while there is no square conflict on the statutory question, a greater number of Circuit Judges have condemned or doubted the validity of the migratory bird rule than have vindicated it. When we put aside the opinion below as constrained by the law of the case doctrine, there are only two judges of the Ninth Circuit supporting the rule and one judge of the Seventh. *Leslie Salt II, supra; Hoffman Homes, supra* (dictum).[12] Of the opposite view, one may count at least five Circuit Judges.

Presumably, the tentative position of two judges of the Fourth Circuit panel in *Tabb Lakes, supra*, is that the migratory bird rule is, or probably is, *ultra vires*. *See* 20 Envtl. L. Rptr. at 20009, adopting the District Court opinion, which expressed "grave doubts" as to the substantive validity of the migratory bird rule. We also invoke the

[12]In light of its ultimate holding that the migratory bird rule was inapplicable, the view expressed concerning its validity is essentially dictum.

wholly unequivocal opinions of Judge Manion of the Seventh Circuit and Judge Rymer of the Ninth condemning the rule on constitutional or statutory grounds or both. *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310, 1312-1323 (7th Cir. 1992), opinion vacated but adhered to by Judge Manion on rehearing, 999 F.2d at 262-263; *Leslie Salt II, supra*, 896 F.2d at 361-362 n.1. And, finally, we note the doubts expressed by Judge Merritt of the Sixth Circuit. *United States v. Larkins*, 852 F.2d 189, 193-194 (6th Cir. 1988) (concurring opinion).

C. The Administrative Law Question

As the court below stated, "[i]t is undisputed that the [migratory bird rule] has not been subjected to notice and comment," as required for "substantive" rules by the Administrative Procedure Act. P. A-8, *infra*. The consequence is that the rule is ineffective unless it properly can be characterized as a mere "interpretive" regulation. APA, 5 U.S.C. § 553(b)-(d); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303 (1979).

1. The grounds on which the Ninth Circuit concluded that the migratory bird rule was an "interpretive" regulation, exempt from the notice-and-comment requirement of the APA, are not clearly articulated. In its first opinion, the court decided the question in total silence. *See* p. A-8, *infra*. And the second panel, applying the law of the case, merely concluded that the earlier ruling was "plausible." P. A-10, *infra*. Nevertheless, it is now the law of the Ninth Circuit that the migratory bird rule is effective without notice and comment and this is in direct conflict with the law of the Fourth Circuit, established in the *Tabb Lakes* case, *supra*.

2. The Ninth Circuit decision, we submit, is, in any event, plainly wrong. There is no gainsaying that the adoption of the migratory bird rule in 1985 effected a new, and massive, extension of regulatory jurisdiction by the Corps of

Engineers and EPA. The Government cannot seriously maintain that the rule was mandated by the statute itself; it can only be justified, if at all, as an administrative implementation of Clean Water Act goals pursuant to legislatively delegated authority. Whatever the opinion of the Ninth Circuit, that describes a "substantive" rule, subject to the notice-and-comment provisions of the APA. *See Chrysler Corp. v. Brown*, *supra*, 441 U.S. at 301; *Batterson v. Francis*, 432 U.S. 416, 425 n.9 (1977); *Lincoln v. Vigil*, 124 L. Ed. 2d 101, 114-115 (1993). In fact, that was the view of the Corps itself, at the highest levels, in mid-1985. *1985 Oversight Hearings* at 171-172 (Asst. Secretary Dawson: "before we could promulgate such a position, it would very likely require a rulemaking"). To hold otherwise is effectively to write out of the law the salutary requirement that an administrative agency intending to impose new rights and duties must afford the affected public an opportunity to comment on the proposed rule.

D. The Penalty Question

Although no persuasive reason is given for doing so, the majority below chose to follow the Eleventh Circuit in ruling that monetary penalties must be assessed by a court finding a violation of the Clean Water Act. Pp. A-15 to A-17, *infra*. For our part, we believe the dissenting Judge has the better of the argument on this issue. See pp. A-17 to A-19, *infra*. But, at the outset, we stress that the disagreement is not merely between the Members of a panel of the Ninth Circuit.

1. The majority below purports also to be following the Fourth Circuit in *Stoddard v. West Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986). P. A-16, *infra*. But even the abbreviated quotation from that case, including the qualification "under the circumstances of this case," alerts us that the Fourth Circuit was *not* there

announcing the inflexible rule adopted below. Indeed, on the same page, the court went on to say that "a fine must be imposed *when the violations have been as pervasive as those perpetrated by the Sewer Authority during the extended period from 1977 to 1983.*" *Ibid.* (emphasis added). This more flexible approach is confirmed by precedent in the Circuit both before and after *Stoddard*. Thus, in *State Water Control Board v. Train*, 559 F.2d 921, 927 (4th Cir. 1977), the Fourth Circuit unequivocally stated that "in cases where enforcement proceedings are brought [under the Clean Water Act], whether by EPA or by private citizens, the courts retain *equitable discretion* to determine *whether* and to what extent fines and injunctive sanctions should be imposed for violations [in good faith]" (emphasis added). And, more recently, the same Court wrote that "once an *ongoing* violation is shown, the court is *virtually* obligated to assess penalties." *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 697 (4th Cir. 1989) (emphasis added). Plainly, this is not a statement that a court is bound to assess penalties in *every* case in which a violation is found — even where the violator was acting in good faith, did not profit by its act, the violation has long ceased, and no harm to the environment has resulted.

The upshot is that the Fourth Circuit is *not* in harmony with the Eleventh (and now the Ninth) on this issue, but, rather, is *in conflict* with those Circuits. And, as the dissenting Judge below noted the Sixth Circuit has declared the same disagreement in dictum. P. A-18, *infra*, citing *United States v. Winchester Mun. Util.*, 944 F.2d 301, 306 (6th Cir. 1991). There are also District Court decisions at odds with the ruling below. *See* p. A-18, *infra*.

2. The mandatory penalty rule entrenched by the majority below also contradict *dicta* in *this* Court. Speaking of judicially imposed fines (before administrative penalties had been authorized), the Court stated that under the Clean

Water Act "civil penalties, payable to the Government, also *may* be ordered by the court." *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 n.25 (1981) (emphasis added). So, also, in *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 53 (1987), it was said that "if the citizen prevails in such an action, the court *may* order injunctive relief and/*or* impose civil penalties" (emphasis added). And in *Tull v. United States*, 481 U.S. 412, 427 (1987), the Court spoke of the role of the trial court in a Clean Water Act case to "determine the amount of penalty, *if any*" (emphasis added). *See also id.* at 425 (suggesting that injunctive relief may be awarded instead of a mandatory fine). And see *United States v. Larkins*, 657 F. Supp. 76, 87 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989); *United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965 (S.D. Fla. 1989); W.L. Want, *Law of Wetlands Regulation*, § 12.03, p. 12-5.

3. On the merits, it ill behooves the Government to claim that "shall" precludes discretion when it has persuaded the courts that an apparently more unequivocal "shall" in the same Section 309 of the Clean Water Act is not mandatory. *See Dubois v. Thomas*, 820 F.2d 943, 948-949 (8th Cir. 1987), and *Sierra Club v. Train*, 557 F.2d 485, 490-491 (5th Cir. 1977) (construing CWA § 309(a)(3), 33 U.S.C. § 1319(a)(3)). But, in any event, it is enough to recognize (with Judge O'Scannlain, *see* pp. A-17 to A-18, *infra*) that "shall be subject to a civil penalty" is *not* the equivalent of "shall pay" or "shall be assessed a civil penalty." Rather, the words tell us that the violator is *exposed* to being fined — if the Government seeks that remedy and the court agrees to impose it. *See* 2 S.M. Novick, *et al.*, *Law of Environmental Protection*, § 12.08[1][c], pp. 12-172 to 12-173. This is, indeed, what the legislative history indicates, the relevant Report stating that "the courts are *authorized* to apply appropriate civil

penalties under Section 309(d)." H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972) (emphasis added) (quoted at p. A-18, *infra*).

In sum, the provision that the violator is "subject to" a civil penalty is the equivalent of saying that the Court "may" impose such a fine. To be sure, as the majority below stressed (p. A-16), that is the formulation chosen in the Clean Water Act in respect of *administrative* penalties: "The Administrator or Secretary, as the case may be, *may* . . . assess a class I civil penalty or a class II civil penalty" against a violator. CWA § 309(g)(1), 33 U.S.C. § 1319(g)(i) (emphasis added). But it proves nothing that Congress chose different words, albeit with the same import, when addressing judicial discretion to impose fines. Since there is no reason to suppose that the EPA Administrator, when acting as an adjudicator, was meant to enjoy greater latitude than a judge, we must conclude that neither is precluded from declining to assess penalties in appropriate cases. The court's discretion in the matter of monetary penalties may not be as broad as with respect to equitable remedies. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). But, even here, the judge is not a mere automaton, implementing the Government's choices.

CONCLUSION

For the reasons stated, certiorari should be granted to review the decision of the Court of Appeals and the judgment of that court should be reversed with instructions to vacate the judgment of the District Court and to direct that court to re-instate the original judgment in favor of petitioner, except only as to the nine acres of "corners" or "tips" over which Clean Water Act jurisdiction is no longer contested.

Respectfully submitted,

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July 11, 1995

APPENDIX A

LESLIE SALT CO., a Delaware corporation;
CARGILL, INC.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 93-15932

United States Court of Appeals
for the Ninth Circuit.

Appeal from the United States District Court
for the Northern District of California.
D.C. No. CV-85-8615-CAL
(Consolidated)
Charles A. Legge, District Judge, Presiding.

Argued and Submitted November 14, 1994
Filed May 22, 1995

OPINION

Before DONALD P. LAY,* HARRY PREGERSON, and DIARMUID O'SCANNLAIN, Circuit Judges.

* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

O'SCANNLAIN, Circuit Judge:

We must decide whether to revisit an issue previously resolved by this court — whether isolated, seasonally dry intrastate waters used only by migratory birds are within the regulatory reach of the Clean Water Act. We also decide whether, in the event of violations of the Act, civil fines are mandatory or discretionary.

I.

Cargill, Inc., the corporate successor to Leslie Salt Co., owns a 153-acre tract of land southeast of San Francisco. The property abuts the San Francisco Bay National Wildlife Refuge and lies near Newark Slough, a tidal arm of San Francisco Bay. A road divides the property into a 143-acre parcel and a 10-acre parcel. Until 1959, Leslie Salt used the property for salt manufacturing. The eastern part of the 143-acre parcel still contains pits that were used to collect calcium chloride, and the western part contains shallow basins that were used for crystallizing salt.

This appeal centers on 12.5 acres out of the 143-acre parcel, on which the former crystallizers and calcium chloride pits still lie. During much of the year, these areas are dry. During the winter and spring, however, rainwater creates temporary ponds. Migratory birds use these ponds for habitat. The dispute in this case began in 1985, when Leslie Salt began digging a feeder ditch and a siltation pond on its property and began discharging fill that affected the seasonally ponded areas.

A.

Under the Clean Water Act ("the Act"), the discharge of any "pollutant" — which includes dredged or fill materials — into "navigable waters" is forbidden unless authorized by a permit issued by the Army Corps of Engineers (the "Corps"). 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). "Navigable waters" is defined in the Act as "waters of the United States." 33 U.S.C. § 1362(7). The Act provides no further guidance as to what these terms encompass. The Corps has promulgated regulations defining "waters of the United States" as:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> * * *
>
> (3) All *other waters* such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, *the use, degradation or destruction of which could affect interstate or foreign commerce* including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are or could be used for industrial purposes by industries in interstate commerce;

33 C.F.R. § 328.3(a) (emphasis added). *See also* 40 C.F.R. § 230.3(s)(3) (EPA's identical definition).

In the preamble to the 1986 regulations, the Corps suggested that "waters of the United States" also includes waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species; or
>
> d. Used to irrigate crops sold in interstate commerce.

51 Fed. Reg. 41,217 (1986). This preamble material has never been subjected to notice-and-comment procedures and has not been promulgated as an official regulation. The predicate for jurisdiction over the seasonally ponded areas

still in dispute in this case is their status as "other waters" which are used as habitat by migratory birds.

B.

Upon learning that Leslie Salt was discharging fill that affected the seasonally ponded areas, the Corps issued a cease and desist order under section 404 of the Act. Leslie Salt filed suit challenging the Corps' jurisdiction over the property. The United States also brought an enforcement action, which was consolidated with Leslie Salt's suit.

The district court originally held that the Corps had no jurisdiction over Leslie Salt's property. *Leslie Salt Co. v. United States*, 700 F. Supp. 476 (N.D. Cal. 1989) ("*Leslie Salt I*"). On the issue that is currently before this court, the district court held that the temporary ponds in the crystallizers and the pits were not "other waters" under 33 C.F.R. § 328.3(a)(3), because they had been artificially created and were dry much of the year.

On appeal, this court reversed and remanded. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126, 112 L. Ed. 2d 1194, 111 S. Ct. 1089 (1991) ("*Leslie Salt II*"). The court held, among other things, that the fact that the crystallizers and pits were artificially made and dry part of the year did not exclude them from being "other waters." *See id.* at 359-60. The court also held that "the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Id.* at 360. The court thus reversed and remanded for a factual determination of which parts of Leslie Salt's property had sufficient connections to interstate commerce to be subject to the Corps' jurisdiction under the Act.

On remand, the district court found that roughly 12.5 acres of seasonally ponded areas, primarily in the calcium chloride pits, were subject to jurisdiction. *Leslie Salt Co. v. United States*, 820 F. Supp. 478 (N.D. Cal. 1992) ("order for judgment") ("*Leslie Salt III*"). The court justified this holding by referring to the evidence summarized in the United States' Memorandum on Remand. *See id.* at 480. Among other things, this Memorandum states that some 55 species of migratory birds use the seasonally ponded areas as habitat. The court also held that Leslie Salt violated the Act in three of these areas by discharging fill or altering structures without a permit at specific points. Finally, in proceedings addressing the issue of remedies, the court ruled that penalties are mandatory under section 309(d) of the Act when a violation has been found, and that the United States was entitled to injunctive relief to restore the property to its preexisting condition. *See id.* at 483-84 ("order regarding remedies"). The parties subsequently stipulated to a penalty of $50,000 and a restoration plan. The stipulation preserved Cargill's right to appeal the issue of whether penalties are mandatory.

II.

Cargill urges this court to revisit the *Leslie Salt II* court's determination that the Corps' jurisdiction under the Act reaches isolated waters used only by migratory birds. Under law of the case doctrine, however, one panel of an appellate court will not reconsider matters resolved in a prior appeal to another panel in the same case. *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826, 62 L. Ed. 2d 33, 100 S. Ct. 49 (1979); 18 Wright & Miller, *Federal Practice & Procedure* § 4478, at 788 (1982). In the subsequent appeal, "the scope of review is narrowed to the limitations of the remand." *Adamian v. Lombardi*, 608 F.2d

1224, 1228 (9th Cir. 1979), *cert. denied,* 446 U.S. 938, 64 L. Ed. 2d 791, 100 S. Ct. 2158 (1980).

In *Leslie Salt II,* a panel of this court held that "the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." 896 F.2d at 360. The court remanded only for a "factual determination of the sufficiency of the property's connections to interstate commerce." *Id.* at 361. Thus, the validity of the "migratory bird rule" was established in the first appeal, and this court's review should generally be limited to the issues decided on remand — the property's specific connections to interstate commerce due to migratory bird use. However, Cargill does not appeal the district court's factual findings.

Instead, Cargill first claims that this court should not apply law of the case because the panel in *Leslie Salt II* upheld the migratory bird rule in "a bare conclusion" and "without any discussion." Admittedly, a more detailed explanation for such a significant holding might have been more illuminating. However, Cargill's argument fails for two reasons. First, the panel's holding, though succinct, was addressed in a separate section of the opinion, specifically referred to the migratory bird examples in the preamble to the 1986 regulations, and was supported by citations to relevant case law. *Leslie Salt II,* 896 F.2d at 360. Judge Rymer's dissent in *Leslie Salt II* challenged the majority on precisely this point, which shows that the panel was aware of the issue. *See id.* at 361-62 n.1. Second, "even summarily treated issues become the law of the case." *Alliance for Cannabis Therapeutics v. DEA,* 15 F.3d 1131, 1135 (D.C. Cir. 1994). This court has followed law of the case even where the first panel's holding was "cryptic and somewhat ambiguous." *Hanna Boys Ctr. v. Miller,* 853 F.2d 682, 687 (9th Cir. 1988). *See also Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988) ("The law of the case turns on whether a court previously decided upon a rule of law . . . not on whether, or how well, it explained the decision.").

The law of the case doctrine is not an absolute bar to reconsideration of matters previously decided. The doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson,* 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912). Thus, the court may reconsider previously decided questions in cases in which there has been an intervening change of controlling authority, new evidence has surfaced, or the previous disposition was clearly erroneous and would work a manifest injustice. *Merritt v. Mackey,* 932 F.2d 1317, 1320 (9th Cir. 1991); 18 Wright & Miller, § 4478, at 790.[1] Cargill's substantive arguments are essentially an attempt to show that this court's decision in *Leslie Salt II* was clearly erroneous. This court will address the merits of Cargill's claims only so far as necessary to determine whether the matter settled in *Leslie Salt II* should be reconsidered. *See Merritt,* 932 F.2d at 1320.

III.

Cargill makes several substantive and procedural challenges to the validity of the migratory bird rule. Because law of the case applies to these claims, Cargill must show not only that the *Leslie Salt II* court's holding regarding the

[1] The first two circumstances do not apply in this case. The evidence considered on remand was largely the same as the evidence in the first trial. Although Cargill claims the law has changed because the Corps has not subjected the migratory bird rule to notice and comment, this is actually just a continuation of the status quo. Regardless, it does not constitute controlling authority in this case.

migratory bird rule was wrong, but that it was clearly wrong. *See Merritt*, 932 F.2d at 1322.

A.

Cargill claims that the preamble to the 1986 regulations promulgated a rule without notice and comment as required by the Administrative Procedure Act. 5 U.S.C. § 553. It is undisputed that the preamble has not been subjected to notice and comment.

The *Leslie Salt II* court did not expressly address this claim in its opinion. However, the briefs and other materials submitted to that court reveal that it was aware of both the arguments and the cases relied upon by Cargill. "The law of the case applies to 'issues decided explicitly or by necessary implication in this court's previous disposition.'" *Hanna Boys Ctr.*, 853 F.2d at 685 (quoting *Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982)). By holding that use by migratory birds could form a sufficient connection to interstate commerce to support jurisdiction, the *Leslie Salt II* court implicitly rejected all arguments that the rule is invalid for procedural reasons under the Administrative Procedure Act as well.

The merits of Cargill's claim turn on whether the migratory bird examples in the preamble are characterized as a substantive rule or an interpretive rule. A substantive rule is one that imposes "general, extra-statutory obligations pursuant to authority properly delegated by the legislature." *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984) (quotation omitted). An interpretive rule is one that merely explains "what the administrative officer thinks the statute or regulation means." *See id.* at 613. A substantive rule must be subjected to notice and comment procedures, 5 U.S.C. § 553, but an interpretive rule need not. *Id.* at § 553(b)(3)(A).

The United States contends that the migratory bird examples are an interpretive rule because they merely set out the Corps' understanding of the statutory term "waters of the United States." The United States gains support for its position from *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993), in which the Seventh Circuit held that it was reasonable for the EPA to interpret 40 C.F.R. § 230.3(s)(3) as allowing migratory birds to form the connection between "other waters" and interstate commerce.[2] The court noted that millions of dollars are spent on hunting, trapping, and observing migratory birds, and that the destruction of wetlands impinges on that commerce. *See id.* at 261. By holding that the "other waters" regulation could be read to encompass waters used by migratory birds, the court implicitly treated this as a reasonable interpretation of the statutory term "waters of the United States." By analogy, the migratory bird examples in the preamble could also be seen as merely an interpretation of the Act as opposed to a substantive addition to its reach.

If this court were deciding the issue for the first time, a much more detailed examination of the migratory bird rule's effect on agency decisionmaking might be in order. *See, e.g., Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1016 (9th Cir. 1987). The court would also have more leeway in its final characterization of the rule. *See, e.g., Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988) (holding "migratory bird rule" invalid as a substantive rule promulgated without notice and comment), *aff'd*, 885 F.2d 866 (4th Cir. 1989). However, at this point in the proceedings, the court may address the merits of Cargill's claims only so far as necessary to determine whether the *Leslie*

[2]The EPA and the Corps have concurrent jurisdiction to enforce the Act. 40 C.F.R. § 230.3(s)(3), promulgated by the EPA, is identical to 33 C.F.R. § 328.3(a)(3), which was promulgated by the Corps and is at issue in this case.

Salt II court was clearly wrong. *See Merritt,* 932 F.2d at 1320. Given that it is plausible to find that the preamble is merely an interpretive rule, and thus not subject to the notice-and-comment requirements of the Administrative Procedure Act, the holding in *Leslie Salt II* cannot be deemed clearly erroneous on this ground.

B.

Cargill claims that the Corps' interpretation of the Act to extend jurisdiction to habitat used by migratory birds is unreasonable. Cargill attempts to relitigate the *Leslie Salt II* court's holding that: "the Clean Water Act[ ] is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds . . . ." *Leslie Salt II*, 896 F.2d at 360. Indeed, Judge Rymer's dissent took issue with this part of the holding. *See id.* at 361 n.1. However, the existence of a dissent, though it may heighten our concerns, does not compel the court to conclude that the decision in *Leslie Salt II* was incorrect. *See Merritt,* 932 F.2d at 1321-22.

Cargill's claim turns on whether the preamble's example of waters "which are or would be used as habitat by other migratory birds which cross state lines," 51 Fed. Reg. 41,217 (1986), can be seen as a reasonable interpretation of the Act's term "waters of the United States," 33 U.S.C. § 1362(7). "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 131, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel,* 467 U.S. 837, 842-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)).

The reasonableness of the Corps' interpretation must be judged in light of the Act's language, policies, and legislative

history. The language of the Act evinces broad congressional purposes that can be cited in support of the Corps' interpretation. For example, section 1251(a)(2) states that it is one of the Act's goals and policies to "provide[ ] for the protection and propagation of fish, shellfish, and wildlife." Similarly, section 1343(c)(1) instructs the EPA, in its formulation of guidelines for determining what constitutes degradation of waters, to consider "the effect of disposal of pollutants on . . . fish, shellfish, [and] wildlife." There is no suggestion in the language of the Act that isolated waters used only by migratory birds fall within its ambit. Nevertheless, the Act's policy of protecting wildlife could plausibly be read to stretch this far.

Clearly the Act fails to mention isolated wetlands. And, to the extent it is relevant, neither does the Act's legislative history from 1972 and 1977. However, legislative history from 1972 asserts Congress's intent to extend Act jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause. S. Rep. No. 1236, 92nd Cong., 2d Sess. 144 (1972). *See also Rueth v. EPA,* 13 F.3d 227, 231 (7th Cir. 1993) (noting "Congress's intent to make the Clean Water Act as far-reaching as the Commerce Clause permits").

The Corps' interpretation also finds some support in the Supreme Court's analysis of the Act. In *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 131-35, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985), the Court held that it was reasonable for the Corps to exercise jurisdiction over wetlands *adjacent* to other waters. The Court cited with apparent approval the Corps' findings that "wetlands . . . may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." *Id.* at 135. The Court also referred to the Corps' assessment that "adjacent wetlands may serve significant natural biological functions,

including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." *Id.* at 134-35 (quotation omitted). These statements applied to adjacent wetlands, not to isolated, seasonally ponded areas as are at issue in this case. *See id.* at 131 n.8. The seasonally ponded areas on Cargill's property have no hydrological connection to any other body of water; indeed, for much of the year they do not even exist. Nevertheless, the Corps' rationale for regulating adjacent wetlands may have some application to isolated waters as well. The seasonally ponded areas may have a connection to the aquatic ecosystem in their role as habitat for migratory birds.

Finally, as discussed above, the Seventh Circuit's decision in *Hoffman Homes* supports the notion that it is reasonable to interpret the Act as allowing migratory birds to be the connection between a wetland and interstate commerce. *Hoffman Homes,* 999 F.2d at 261. *See also Utah v. Marsh,* 740 F.2d 799, 803 (10th Cir. 1984) (holding that a lake's presence "on the flyway of several species of migratory waterfowl" was one factor among several supporting Act jurisdiction).

If this court were considering the issue for the first time, Cargill's arguments might well deserve closer consideration. However, in light of the broad purposes evinced by the language of the Act and, to a greater extent its legislative history, and the tangential support found in other cases, the holding in *Leslie Salt II* cannot be considered clearly erroneous on this ground.

C.

Cargill claims that, if the migratory bird rule is held to be a reasonable interpretation of the Act, then it would exceed Congress's powers under the Commerce Clause. Again, this is an attempt to relitigate the *Leslie Salt II* court's holding that "the commerce clause power . . . is broad enough to

extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Leslie Salt II,* 896 F.2d at 360. Even Judge Rymer, in dissent, agreed that the commerce power can reach regulation of migratory bird habitat; she argued instead that Congress did not intend to extend Act jurisdiction to such an extent. *Id.* at 361 n.1.

A court's review of congressional enactments under the Commerce Clause should be highly deferential. *United States v. Evans,* 928 F.2d 858, 862 (9th Cir. 1991). "Activity that is seemingly insignificant may be regulated [under the Commerce Clause] where one individual's 'contribution, taken together with that of many others similarly situated, is far from trivial.' " *Columbia River Gorge United v. Yeutter,* 960 F.2d 110, 113 (9th Cir.) (quoting *Wickard v. Filburn,* 317 U.S. 111, 127-28, 87 L. Ed. 122, 63 S. Ct. 82 (1942)), *cert. denied,* 113 S. Ct. 184 (1992).

One rationale for regulating migratory bird habitat as an element of interstate commerce was expressed by the Seventh Circuit in *Hoffman Homes:* "Throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds." *Hoffman Homes,* 999 F.2d at 261.

The Supreme Court has suggested that Congress's commerce clause powers extend to the regulation of migratory birds. In *Hughes v. Oklahoma,* 441 U.S. 322, 329-36, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979), the Court impliedly said as much when it held that state regulations of intrastate wildlife fall within the ambit of the dormant Commerce Clause. Other courts have also found that the Commerce Clause extends this far. In *Palila v. Hawaii Department of Land and Natural Resources,* 471 F. Supp. 985, 995

(D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981), the court, in upholding the Endangered Species Act against a Commerce Clause challenge, stated that "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species."

The migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason. In this case, there is no evidence of human contact with the seasonally ponded areas. The only humans that hunt or photograph the birds using these ponds apparently are doing so after they have reached other locations. Nevertheless, given the broad sweep of the Commerce Clause, the holding in *Leslie Salt II* cannot be considered clearly erroneous on this ground.[3]

We conclude that reconsideration of *Leslie Salt II* by this panel is inappropriate.

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[3]Cargill also claims that Congress unconstitutionally delegated its legislative powers to the Corps. The vitality of the nondelegation doctrine is questionable, and in the case of the Act, Congress merely left it up to the implementing agencies to define the term "waters of the United States." In light of the underlying policies expressed in the Act, this is more than the mere "intelligible principle" required to uphold a delegation of legislative power. *Mistretta v. United States*, 488 U.S. 361, 377, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989). *See also Mills v. United States*, 36 F.3d 1052, 1056 (11th Cir. 1994) (rejecting nondelegation challenge to the Act).

IV.

PREGERSON, Circuit Judge, with whom LAY, Circuit Judge, concurs:

We concur in Judge O'Scannlain's opinion as to Parts I through III. However, we deliver the opinion of the Court as to Part IV, addressing the issue of whether civil penalties are mandatory under section 309(d) of the Act.

Cargill claims the district court erred when it held that section 309(d) of the Act mandates that a civil penalty be imposed for Cargill's violations. See *Leslie Salt III*, 820 F. Supp. at 483-84.

Section 309(d) provides:

> Any person who violates [one of the enumerated provisions of the CWA] *shall be subject to a civil penalty* not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, . . . any good-faith efforts to comply with the applicable requirements, . . . and such other matters as justice may require.

33 U.S.C. § 1319(d) (emphasis added). The question of whether the Act mandates civil penalties is a question of statutory construction reviewed de novo by this court. *United States v. Richison*, 901 F.2d 778, 780 (9th Cir. 1990).

This is an issue of first impression before this court. "In construing statutes in a case of first impression, we first look to the language of the controlling statutes, and second to legislative history." *Central Mont. Elec. Power Coop. v. Administrator of Bonneville Power Admin.*, 840 F.2d 1472, 1477 (9th Cir. 1988). "Absent a clearly expressed legislative intent to the contrary, the plain language must ordinarily be regarded as conclusive." *Id.*

The language of section 309(d) is somewhat odd in that it uses the words "shall be subject to" instead of saying "shall pay." At first glance, this would seem to mean that while violators are subject to penalty, they may or may not be fined — that is, penalties are discretionary with the district court. However, the Fourth and Eleventh Circuits have held that the use of the words "shall be subject to" means that civil penalties are mandatory under section 309(d). *See Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990) ("This language makes clear that once a violation has been established, some form of penalty is required."); *Stoddard v. W. Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986) ("This language leaves little doubt that, under the circumstances of this case, a penalty in some form is mandated.").

We agree with the other circuits that have held that civil penalties are mandatory under section 309(d). First, as a matter of statutory interpretation, a longstanding canon holds that the word "shall" standing by itself is a word of command rather than guidance when the statutory purpose is the protection of public or private rights. *Escoe v. Zerbst*, 295 U.S. 490, 494, 79 L. Ed. 1566, 55 S. Ct. 818 (1935) (Cardozo, J.). The Act serves precisely such purposes. Second, Congress used less definitive language when it wanted to indicate that penalties are discretionary. Shortly after section 309(d), in section 309(g)(1), Congress used the words "*may* . . . assess a . . . civil penalty" with regard to administrative actions. 33 U.S.C. § 1319(g)(1) (emphasis added). If Congress had intended civil penalties under section 309(d) to be discretionary, it would have used the word "may" instead of "shall be subject to."

Finally, the fact that civil penalties are mandatory under section 309(d) does not restrain a district court's discretion as significantly as Cargill suggests. District courts retain the broad discretion to set a penalty commensurate with the

defendant's culpability. Indeed, in its consideration of the seriousness of a defendant's violations and "such other matters as justice may require," the district court could assess a civil penalty of only a nominal amount.

V.

In sum, we affirm the district court's "order on judgment" on the ground that law of the case bars reconsideration of the validity of the migratory bird rule and that Cargill's challenges to this rule do not demonstrate that the holding of the prior appeal was clear error. To do otherwise would too lightly regard the decision of another panel of this court. Only an en banc court may alter such outcome.

We also affirm the "order regarding remedies" to the extent that it held that civil penalties are mandatory under section 309(d) of the Act.

AFFIRMED.

O'SCANNLAIN, Circuit Judge, dissenting in part:

I respectfully dissent from Part IV of the majority opinion.

Section 309(d) of the Clean Water Act ("the Act") provides:

> Any person who violates [one of the enumerated sections of the Act] shall *be subject* to a civil penalty not to exceed $25,000 per day for each violation.

33 U.S.C. § 1319(d) (emphasis added). The majority reads this language to mean that civil penalties are mandatory for proven violations of the Act. If section 309(d) had provided "Any person who violates . . . shall *pay* a civil penalty," I would readily agree with the majority's interpretation. However, it does not so provide, and we cannot ignore the three

words following the word "shall." To do otherwise "violates the settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 35, 117 L. Ed. 2d 181, 112 S. Ct. 1011 (1991).

Section 309(d) did not use the words "shall pay"; it used the words "shall be subject to." The latter phrase is synonymous with "shall be liable to" or "shall be answerable to." *Black's Law Dictionary* 1278 (5th ed. 1979). Read literally, the section merely states that a violator is liable to be assessed a civil penalty, not that he or she must be. In other words, civil penalties are discretionary. Several district courts facing this question have come to this conclusion as well. *See, e.g., Hawaii's Thousand Friends v. Honolulu,* 149 F.R.D. 614, 617 (D. Haw. 1993); *United States v. Bradshaw,* 541 F. Supp. 880, 883 (D. Mass. 1981). *See also United States v. Winchester Mun. Util.,* 944 F.2d 301, 306 (6th Cir. 1991) (suggesting that district courts that found civil penalties discretionary are correct).

If Congress had meant civil penalties to be mandatory, it could have written section 309(d) to state that a violator "shall pay" a civil penalty. Indeed, these are precisely the words it has chosen in numerous civil penalty provisions. *See, e.g.*, 7 U.S.C. § 1596(a) ("Any person who . . . violates any provision of this chapter . . . *shall pay* a fine of not more than $1,000 . . .") (emphasis added); 26 U.S.C. § 6038(b)(1) ("If any person fails to furnish . . . any information . . . required under [this section], such person *shall pay* a penalty of $1,000 . . .") (emphasis added).

In addition, to the extent it might be relevant, the Act's legislative history reveals no congressional intent whatsoever to make civil penalties mandatory. The House Report to the 1972 Amendments simply states that "the courts are *authorized* to apply appropriate civil penalties under Section 309(d)." H.R. Rep. No. 911, 92nd Cong., 2d Sess. 133

(1972) (emphasis added). It does not suggest that Congress believed the courts are required to do so.

Even if section 309(d) were found to be ambiguous, the rule of lenity should counsel us to choose the interpretation least likely to impose penalties unintended by Congress. *See National Org. for Women, Inc. v. Scheidler,* 127 L. Ed. 2d 99, 114 S. Ct. 798, 806 (1994). The rule of lenity has not been limited to criminal statutes, particularly when the civil sanctions in question are punitive in character. *See United States v. Thompson/Center Arms Co.,* 504 U.S. 505, 112 S. Ct. 2102, 2110 n.10, 119 L. Ed. 2d 308 (1993). The penalties contemplated by section 309(d) clearly have punitive purposes. *Tull v. United States,* 481 U.S. 412, 422-23, 95 L. Ed. 2d 365, 107 S. Ct. 1831 (1987). Thus, section 309(d) should not be read to require civil penalties in all cases but only where the district court, in its discretion, finds them appropriate.

Undoubtedly, civil penalties will be imposed in most cases of proven violations of the Act; however, by leaving them to the district court's discretion, more appropriate remedies may be fashioned in exceptional cases. For example, the district court may encounter situations in which the purposes of the Act are better served by seeing to it that the violator undertakes comprehensive corrective actions. *See, e.g., Gwaltney v. Chesapeake Bay Found.,* 484 U.S. 49, 60-61, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987) (suggesting that civil penalties might be inappropriate where violator agrees to take some extreme corrective action).

I would therefore reverse the district court's "order regarding remedies" to the extent that it held that section 309(d) of the Act mandated that a civil monetary penalty be imposed for every violation of the Act.

APPENDIX B

LESLIE SALT CO., a Delaware corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

LESLIE SALT CO., a Delaware corporation, et al.,
Defendants.

Nos. C-85-8615-CAL and C-86-4187-CAL
(Consolidated)

In the United States District Court
for the Northern District of California

Filed April 26, 1993

FINAL JUDGMENT

LEGGE, District Judge:

These consolidated cases were tried before the Court, sitting without a jury, and were argued and submitted for decision following briefing. Plaintiff and Defendants, Leslie Salt Co. and Cargill, Incorporated (hereinafter referred to as "Cargill") were represented by Edgar B. Washburn of Washburn, Briscoe & McCarthy. The Defendants and Plaintiff, United States of America, John O. Marsh, Lt. General E.R. Heiberg, and Lt. Col. Andrew M. Perkins (collectively referred to as the "United States") were represented by Letitia J. Grishaw and Scott A. Schachter of the United States Department of Justice. The Save San Francisco Bay Association and the National Audubon Society were granted leave to intervene as Defendants in No. C-85-8615, and were represented by Winifred A. Berman of Shute, Mihaley & Weinberger.

The Court entered a judgment on October 27, 1988. The United States timely appealed that judgment to the United States Court of Appeals for the Ninth Circuit. That court issued its decision reversing in part and remanding the case on February 6, 1990. *See Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990).

Following Cargill's unsuccessful petition for rehearing or rehearing *en banc* and petition for a writ of certiorari, further proceedings were had in this Court in accordance with the remand. These proceedings were had on the record of the original trial, together with additional briefing and argument. On January 6, 1992, this Court entered an order for judgment upon remand.

Following this Court's order for judgment, further proceedings were had concerning remedies sought by the United States. On July 22, 1992, this Court, after having heard oral argument and having been fully briefed and advised in the premises, entered an order regarding remedies.

Based upon the record of the original trial and that of the proceedings on remand, in light of the court of appeals' decision, and the Court having heard and reviewed the testimony of the witnesses, the designated deposition transcripts, the exhibits, the designated responses, the entire record of the case, and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Those portions of Cargill's Parcel 10 and Parcel 143 of the Newark Coyote property marked and cross-hatched on the map attached hereto as Exhibit A are subject to the

jurisdiction of the U.S. Army Corps of Engineers under section 404 of the Clean Water Act. No other portions of the Newark Coyote property are subject to the jurisdiction of that Act.

2. The Rivers and Harbors Act of 1899 does not apply to the Newark Coyote property, and Cargill did not violate the Rivers and Harbors Act.

3. Cargill violated sections 301 and 404 of the Clean Water Act at the points marked "A1" and "A2" on Exhibit A.

4. Cargill also violated sections 301 and 404 of the Clean Water Act at points "B" and "C" on Exhibit A.

5. Section 309(d) of the Clean Water Act requires that penalties be imposed in this case — in other words, the Court has no discretion in that regard in this case. The same statute vests wide discretion in the Court in setting the amount of such penalties. Without waiving, and expressly reserving any rights to appeal this Court's orders of January 6, 1992, and July 22, 1992, and any judgment entered herein, Cargill and the United States stipulated in the Stipulation Re amount of Penalty and Terms of Restoration Plan entered into by the parties, that the amount of the civil penalty is $50,000. The Court finds that a $50,000 civil penalty is supported by the entire record in this case and is consistent with section 309(d) of the Clean Water Act. Cargill shall pay a civil penalty forthwith in that amount.

6. The United States is entitled to injunctive relief which restores the property at the points of violation to essentially their pre-existing condition. Without waiving, and expressly reserving any rights to appeal this Court's orders of January 6, 1992, and July 22, 1992, and any judgment entered herein, Cargill and the United States stipulated in the Stipulation Re Amount of Penalty and Terms of Restoration Plan entered into by the parties, that the restoration is to be

performed in accordance with the terms of the restoration plan set forth in Exhibit B to this Final Judgment. The Court finds that the stipulated restoration is appropriate given all of the facts and circumstances in this case. Cargill shall perform the restoration in accordance with the terms and conditions of Exhibit B.

7. The United States is also entitled to an injunction restraining future violations at those points where the Court found that there were violations of the Clean Water Act. Those points are identified on Exhibit A. The United States is not entitled to an injunction that goes beyond that scope. Cargill is hereby restrained from future violations at those points.

8. Cargill is not entitled to an injunction against the Corps restraining the prospective exercise of its regulatory jurisdiction.

9. The Court vacates its January 4, 1989, award of costs to Cargill. Costs, including attorneys' fees, are not to be awarded to either side.

10. The Court retains jurisdiction in this case to ensure compliance with the terms of this Final Judgment. This final judgment, upon entry after compliance by the United States with the notice and comment provisions in 28 C.F.R. § 50.7 (1992), is the final judgment resolving all issues in this litigation, including civil penalties and injunctive relief.

EXHIBIT A

EXHIBIT B

Cargill shall restore the Newark Coyote property at the points of violation determined by the Court in the January 6, 1992 Order to essentially their preexisting condition, as set forth below.

Cargill shall complete the restoration work described below within 90 days after entry of the Final Judgment.

Restoration of Former Crystallizer (designated as area A in the Court's January 6, 1992 Order):

a. Cargill shall backfill the feeder ditches and siltation basin with clean fill to the pre-violation contour;

b. Cargill shall construct a berm around the entire jurisdictional area in a safe manner, in accordance with generally accepted engineering standards, practices and specifications, outside the jurisdictional boundary;

c. The berm shall be at least one foot in elevation higher than the highest point in the jurisdictional area and shall be constructed and maintained so as to avoid erosion;

d. Cargill shall divert a sufficient amount of water into the bermed area to ensure at least 21 consecutive days of ponding each winter (unless that is impossible due to drought);

e. Any intake and/or spillway structures shall be constructed so as to prevent erosion; and

f. The United States assumes no responsibility for any injury or damage caused by or resulting from the restoration work.

Restoration of the 1988 Bulkhead (designated as Area C in the Court's January 6, 1992 Order):

g. Cargill shall remove the concrete bulkhead and tidegate and return the area to its pre-violation contour;

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h. Any cofferdam needed to perform this restoration work for the bulkhead shall be made of sandbags and all materials shall be removed within five (5) days of completion of the restoration work on this bulkhead; and

i. The United States assumes no responsibility for any injury or damage caused by or resulting from the restoration work.

An individual permit under section 404(a) of the CWA, 33 U.S.C. § 1344(a), shall not be required for performance of the restoration work. The restoration work is authorized by Nationwide Permit No. 32, 33 C.F.R. Pt. 330, App. A (1992). Cargill shall comply with all of the terms and conditions for Nationwide Permit No. 32 in performing the restoration work, including, but not limited to, the obligation to obtain state water quality certification under section 401 of the CWA (or a waiver from that requirement).

Within thirty (30) days after completion of the restoration work, Cargill shall notify the United States Department of Justice in writing. The Corps and Cargill shall then jointly schedule an inspection by the Corps to determine whether the restoration has been successfully completed. Such inspection shall take place within thirty (30) days of the United States' receiving the notice specified above. After such inspection, the Corps shall have fifteen (15) business days to disapprove the restoration work. If the Corps disapproves, it shall set forth its objection in writing to Cargill. Failure to timely object shall be deemed approval. If the Corps should object, as provided herein, Cargill shall have fifteen (15) days to correct any deficiency or submit the matter for resolution by the Court.

APPENDIX C

LESLIE SALT CO., a Delaware corporation,

v.

UNITED STATES OF AMERICA; JOHN O. MARSH, et al.

UNITED STATES OF AMERICA,

v.

LESLIE SALT CO., a Delaware corporation;
CARGILL INC., a Delaware corporation.

Nos. C-85-8615-CAL and C-86-4187-CAL

United States District Court,
N.D. California

January 6, 1992
Order Regarding Remedies July 22, 1992

ORDER FOR JUDGMENT

LEGGE, District Judge:

These consolidated cases are before this court on remand from the United States Court of Appeals for the Ninth Circuit. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) *cert. denied*, 498 U.S. 1126, 111 S. Ct. 1089, 112 L. Ed. 2d 1194 (1991). This court was directed to make two determinations on remand. One is whether the former salt crystallizers and calcium chloride pits on the property have a sufficient connection with interstate commerce to be under the jurisdiction of the Clean Waters Act as "other waters" of the United States. *Id.* at 360. Second, the appellate court determined that some of Leslie's property met the standards for jurisdiction under the Clean Water Act. But because

that jurisdiction did not extend to all of the property, the Ninth Circuit remanded for a determination by this court of the portions of property which are subject to the jurisdiction of the act. *Id.* at 360-61.

I.

After remand, the parties agreed that these decisions would be made based upon the transcript of the first trial, together with certain additional briefs and exhibits, without the necessity for additional testimony. The parties then filed designations of the exhibits, the transcript references which they believed to be relevant and material, further briefs, and maps of the property showing their contentions about the extent of jurisdiction. They agreed that some portions of the property were within or without Clean Water Act jurisdiction, but some remained disputed. Oral argument was held and the case was submitted for decision.

II.

This court has reviewed the opinion of the Ninth Circuit, the transcript of the first trial, the exhibits designated by the parties, the briefs of the parties, and the maps submitted by the parties. This order, together with the map which has been drawn by the court and is attached to this order, constitutes the findings of fact and conclusions of law of this court pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. The findings are made by a preponderance of the evidence.

The maps submitted by the parties contain irregular shapes, and can only be compared with one another by the use of overlays. The portions of the property cannot be described verbally, either by reference to plot numbers, acreage or metes and bounds. Visual rather than verbal delineations are therefore necessary. For that reason, this

court's decisions as to the portions of Leslie's property that are subject to Clean Water Act jurisdiction are delineated on the attached map.

III.

Decisions regarding the extent of "other waters" of the United States require a two-step process.

First, the court must determine the areas that are ponded. The Ninth Circuit said that, "The Corps' determination that the crystallizers and calcium chloride pits are . . . seasonal bodies of water within the meaning of the regulations is proper." *Leslie Salt Co.*, 896 F.2d at 360. However, the crystallizers are large geographic bodies, and the Court of Appeals did not state or imply that because seasonal waters must be considered, the entire crystallizers must be included. Indeed, the whole point of the remand was for this court to determine the portions of the property over which the Corps had jurisdiction in view of the circuit's legal conclusions. *Id.* at 361. And on remand the Corps does not contend that all of the crystallizers are subject to jurisdiction. This court's responsibility is to accept that seasonal waters meet the jurisdictional requirement, but nevertheless to determine where those seasonal waters are.

The second step is to determine whether those areas have a sufficient tie to interstate commerce, because of their use as a habitat by migratory birds or other endangered species. *Id.* at 360. On remand, Leslie made certain concessions regarding which areas were ponded, primarily in the calcium chloride pits, but did not concede that those areas were "other waters."

This court has delineated on the map attached to this order the areas of the crystallizers and calcium chloride pits which it concludes meet the Ninth Circuit's test of "seasonal bodies of water." And this court finds that based upon

the evidence presented, those areas have a connection to interstate commerce as defined in 51 C.F.R. §§ 41206, 41217 (1990). That evidence need not be discussed in this order, but is summarized in the United States' Memorandum on Remand, filed June 28, 1991, pp. 22-24.

IV.

This court's findings regarding the portions of the property that are subject to the jurisdiction of the Clean Water Act as being "wetlands" are marked on the attached map.

A few comments are necessary. Leslie concedes that the area identified as Zone "P" is a wetland. And the court finds that certain other areas are wetlands. But the court finds that certain areas on the map submitted by the Corps are not wetlands. These findings are based on the evidence of the extent of water, the soil hydrology and the nature and extent of the vegetation. These factors were discussed in *Leslie Salt Co.*, 700 F. Supp. at 486-89, and need not be repeated here.

V.

Having determined the extent of the jurisdiction of the Clean Water Act over Leslie's property, this court next turns to the issues of Leslie's alleged violations of that act.

A.

'The Corps also argues that Leslie violated the Rivers and Harbors Act at point "B" on the map. However, that argument is contrary to the record and the law of this case. After the first trial, this court found that Leslie did not violate the Rivers and Harbors Act; *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 482 (N.D. Cal. 1988), *rev'd on*

other grounds, 896 F.2d 354 (9th Cir. 1990), *cert. denied* 498 U.S. 1126, 111 S.Ct. 2089, 112 L. Ed. 2d 1194 (1991). The Court of Appeals did not upset, or indeed directly discuss, that finding. Instead, the Court of Appeals remanded the case to this court for a determination of jurisdiction under the Clean Water Act, *Leslie Salt Co.*, 896 F.2d at 360-61. The court therefore declares that Leslie is not in violation of the Rivers and Harbors Act at point "B."

B.

The Corps contends that Leslie violated the Clean Water Act by the construction of ditches and the movement of fill at points designated as "A" on the map. Those actions occurred in October of 1985, and consisted of the construction of feeder ditches and basins. The court has found on the map that two of the area "A's" which the court has marked "A1" and "A2," are subject to Clean Water Act jurisdiction. The court finds that Leslie's activities at those points were violations of section 301(a) of the Clean Water Act. Leslie discharged "fill" in those areas which are now found to be subject to the jurisdiction of the Act. "Fill" is a defined pollutant. And Leslie did so without obtaining a permit as required by section 404 of the Act.

C.

The Corps contends that Leslie violated the Clean Water Act in December of 1986 at point "B" on the map. It is undisputed that Leslie attempted to block a culvert at that point and did so without a permit. This court has determined that that area is subject to the jurisdiction of the Clean Water Act. And the Ninth Circuit has already determined that this area is connected to the Newark Slough. *Leslie Salt Co.*, 896 F.2d at 358-59. Leslie's activities on the "water" side of the culvert are within the prohibitions of the act.

Leslie contends that its placement of plywood and sandbags to stop the flow of water in that culvert was exempt from the permit requirements of the Act. The claimed exemptions are found in the Clean Water Act, Sections 404(f)(1)(B)(C); 33 C.F.R. § 323.4(a)(2) (1990). These exemptions allow the maintenance of existing structures and the maintenance of drainage ditches. The Ninth Circuit has held that such exemptions are to be narrowly construed. *United States v. Akers*, 785 F.2d 814, 819, 823 (9th Cir. 1986). The court finds that the activities of Leslie in blocking the flow of water through the culvert was not the maintenance of an existing structure or the maintenance of a drainage ditch. And even if those activities were initially exempt, the "recapture" provision of the Clean Water Act would preclude these defenses. Section 404(f)(2) of the Act precludes the exemption of those activities which bring about a "change in use." A change in use would occur when a section 404 wetland is converted to a non-wetland. 33 C.F.R. § 323(4)(C) (1990). The areas onto which the water flowed have now been delineated as wetlands. The purpose of blocking the culvert was to prevent the flow of water onto that wetland. That would bring about a change and would be subject to jurisdiction.

D.

In 1988 Leslie constructed a large bulkhead on the bird refuge side of point "C" on the map. This included a concrete bulkhead and a tide gate, designed to control the flow of water through the culvert onto Leslie's property. The area onto which the water flows is designated as area "P" on the map, and is an area which Leslie concedes is within the jurisdiction of the act.

The activity occurred in 1988, after this court entered the judgment in the first trial. This issue was not then submitted to this court for decision, and of course no decision was

made by the Court of Appeals. The government seeks to amend its complaint to include this alleged violation, and at oral argument Leslie consented to allow it to be considered.

Leslie concedes that its activity occurred in jurisdictional wetlands. But Leslie argues that (1) it was the replacement of a prior tide gate, and was hence exempt from jurisdiction and the Corps' regulations, and (2) that the construction was not a prohibited discharge. The Corps objected to consideration of these defenses. But since the events are subsequent to the original judgment, and the alleged violation is to be considered, Leslie's defenses should also be considered on the merits.

However, this court finds against Leslie on the merits of these defenses. This activity was the construction of a new tide gate south of the culvert, and not the maintenance of the existing tide gate north of the culvert. A new area was affected by Leslie's construction work. And further, the recapture provision discussed above precludes the exemption defenses. *Akers*, 785 F.2d at 822. The court also finds that the installation of the tide gate was the placement of a pollutant. The side-casting and redeposit of excavated wetlands, and the pouring of concrete, would constitute the discharge of a pollutant. 33 U.S.C. § 1362(6) (1990). The court therefore concludes that Leslie violated the Clean Water Act at point "C".

VI.

This court therefore finds, concludes, and declares as follows:

1. Those portions of Leslie's property marked on the attached map are subject to the jurisdiction of the Clean Water Act, and no other portions of the property are subject to the jurisdiction of that act.

2. The Rivers and Harbors Act does not apply to the property, and Leslie did not in [sic] violate the Rivers and Harbors Act.

3. Leslie violated the Clean Water Act at the points marked "A1" and "A2" on the map.

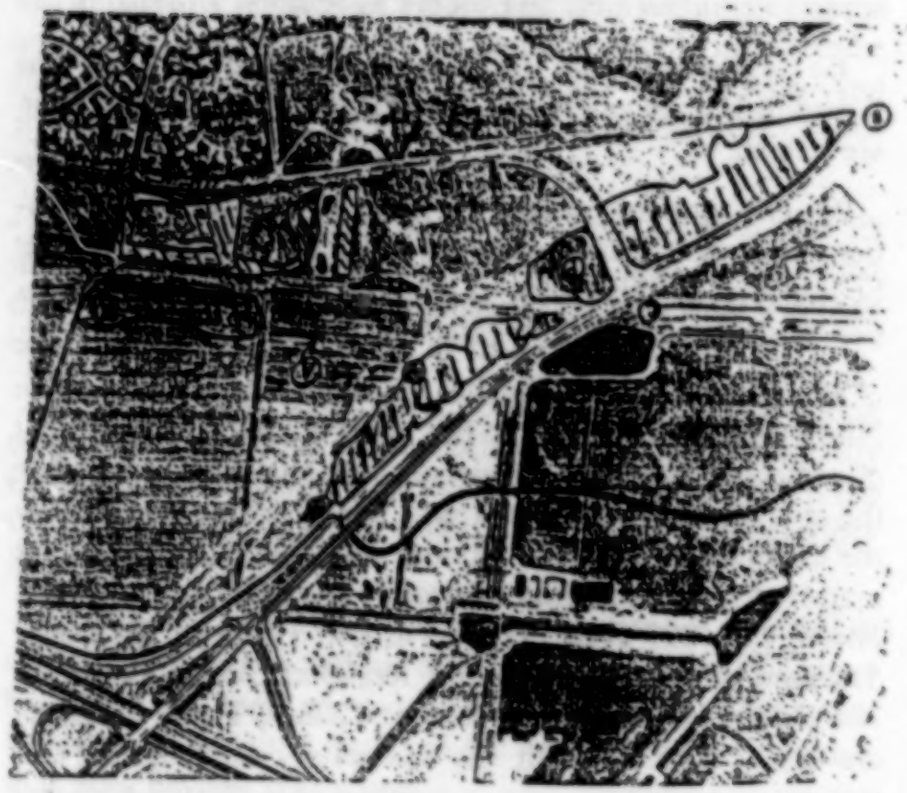
4. Leslie violated the Clean Water Act at point "B."

5. Leslie violated the Clean Water Act at point "C."

6. The court vacates it [sic] January 4, 1989 award of costs to Leslie. Costs will not be awarded to either side. Although the Corps has now established jurisdiction over certain portions of Leslie's land, it has not established jurisdiction over all of the property as it sought to do by the filing of this action.

7. A status conference will be held on February 7, 1992, at 11:00 a.m. for the purpose of considering the further proceedings that are necessary, including remedies.

APPENDIX



ORDER REGARDING REMEDIES

On January 6, 1992 this court entered an order determining those portions of Leslie's property that are subject to the jurisdiction of the United States under the Clean Water Act; determining that Leslie had violated the Clean Water Act at certain points on the property; and directing further proceedings on the issues of remedies. The parties made motions on the issues of remedies, and the motions were submitted to the court for decision. The court has reviewed

the motions, the records, the arguments of counsel, and the applicable authorities, and orders as follows:

1. Leslie asks that the court reconsider its decisions regarding certain violations. The requests for reconsideration are denied.

2. The motions present the issue of whether civil penalties under the Clean Water Act, 33 U.S.C. § 1319(d), *must* be imposed by this court, or whether this court has discretion to determine that *no* penalties should be assessed.

No Ninth Circuit case has decided this question. The Ninth Circuit cases cited to this court do discuss the subject of remedies, but have not decided the question of whether the civil penalties are mandatory. This court is persuaded by the decisions of two other circuits, holding that penalties are mandatory. *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990) at 1142; and *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200 (4th Cir. 1986) at 1208-9. These decisions are also consistent with the mandatory language of the statute.

3. The statute nevertheless vests wide discretion in this court in setting the amount of the penalties. The statute enumerates certain things to be considered, and adds "such other matters as justice may require." This court may ultimately conclude that some or all of the violations call for only minimal penalties. But that issue will unfortunately require another round of proceedings. This court has not considered the arguments regarding the alleged seriousness of the violations and the extenuating or mitigating circumstances. Those matters will be addressed when the United States makes an appropriate motion for specific penalties. The United States should file its motion by August 31, 1992.

4. The United States has directed some discovery to Leslie on the issue of penalties. However, those discovery

requests are extreme. We are dealing with property which has apparently undergone no development since this dispute arose. The vast majority of the property was held not to be subject to the jurisdiction of the Clean Water Act. And some of the evidence requested by the discovery was considered in the trial on the merits.

The court directs that when the United States files its motion for penalties, the United States also specify what discovery it believes is reasonable necessary. Leslie will then either supply that discovery or make its objections.

5. The United States is entitled to injunctive relief which restores the property at the points of violation to essentially their pre-existing condition. Leslie is to submit a plan to the Corps and to the court by August 31, 1992, which describes its proposed restorations.

6. The United States is also entitled to an injunction restraining future violations at those points where this court has found that there were violations of the Clean Water Act. However, the United States is not entitled to an injunction that goes beyond that scope.

7. Leslie's request for an injunction against the United States is denied. While this court would like to see the disputes between the Corps and Leslie with respect to this property put to rest for all time, this court does not have the power to enjoin an agency of the United States from prospective exercise of its claimed jurisdiction. This court will certainly look with disfavor on any attempts by the Corps to relitigate issues and conditions which have already been resolved. But the court cannot preclude the Corps from attempting to exercise its jurisdiction in the future if the conditions or the law change.

IT IS SO ORDERED.

APPENDIX D

LESLIE SALT CO., a Delaware corporation,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, et al.,
Defendants,
and
SAVE SAN FRANCISCO BAY ASSOCIATION,
a non-profit California corporation;
NATIONAL AUDUBON SOCIETY,
a non-profit New York corporation,
Defendant-Intervenors-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

LESLIE SALT CO., a Delaware corporation;
and CARGILL, INC., a Delaware corporation,
Defendants-Appellees.

Nos. 89-15244, 89-15337

United States Court of Appeals,
Ninth Circuit.

DC Nos. CV-85-8615-CAL and CV-86-4187-CAL

Argued and Submitted November 16, 1989
Decided February 6, 1990

OPINION

Before FARRIS, PREGERSON, and RYMER, Circuit Judges.

FARRIS, Circuit Judge:

This is an appeal from a district court decision denying the Army Corps of Engineers jurisdiction under the Clean Water Act, 33 U.S.C. § 1251 et. seq., over a parcel of land near the San Francisco Bay. 700 F. Supp. 476. The Corps had sought to require the landowner to obtain a permit before draining and filling the land, which over many years had acquired some aquatic characteristics. The district court found that because these conditions were artificial and were in part caused by the government, the Corps lacked jurisdiction. We reverse and remand.

BACKGROUND

This dispute revolves around a 153 acre tract of undeveloped land south of San Francisco, called the Newark Coyote Property, owned by Leslie Salt. A road separates the property into two parcels, one of 143 acres ("parcel 143") and one of 10 acres ("parcel 10"). The property abuts the San Francisco National Wildlife Refuge and lies approximately one quarter mile from the Newark Slough, a tidal arm of the San Francisco Bay.

The present condition of the property, or rather its condition in late 1985 through 1986 when the Corps claimed jurisdiction, is the result of many artificial changes to the property over the last 100 years. Originally the property was pasture land. The first change occurred early in this century, when Leslie's predecessors in interest constructed facilities for the manufacture of salt. They excavated pits on the

eastern one-third of parcel 143 for depositing calcium chloride, and created large, shallow, water-tight basins on the western two-thirds for crystallizing salt. Salt production on the property effectively stopped in 1959. The calcium chloride pits and the crystallizers remained however, and each year they temporarily filled with water during the winter rainy season.[1] The extent of ponding is limited, but standing water did form on the property and remain long enough for fish to live in the ponds. Plant life, which had been nonexistent due to the high salinity and compaction of the soil, formed in the crystallizers after Leslie plowed the property in 1983 to combat a dust problem.

The property was also substantially affected by construction of a sewer line and public roads on and around the property. This construction created ditches, road beds, and most importantly, culverts which hydrologically connected the property to the Newark Slough. Caltrans, the state highway authority, also breached a levy on the wildlife refuge adjacent to the property and destroyed a tidegate which had prevented the tidal backflow from reaching Leslie's property.

The effect of all this human activity was to foster natural, ecological developments: tidewater reached the edges of Leslie's property and caused the creation of some wetland features on the southern fringes. Migratory birds used the crystallizers and calcium chloride pits as habitat during the winter and spring when they were flooded. In addition, an endangered species, the salt marsh harvest mouse, used the property as habitat.

The controversy over this property arose in late 1985 when Leslie started to dig a feeder ditch and siltation pond

[1]The San Francisco Bay area has a Mediterranean climate, in which rain falls primarily in the winter and spring, followed by a long dry season.

on parcel 143 in order to drain the land. The Corps soon became aware of this activity and responded by issuing a cease and desist order pursuant to its authority under Section 404 of the Clean Water Act.[2] In that Act Congress directed the Corps, through the Secretary of the Army, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Corps claimed that Leslie was discharging a pollutant (fill) into waters of the United States in violation of section 301 of the Act.[3] The Corps also claimed that Leslie's activities were obstructing the navigable waters of the United States in violation of section 10 of the Rivers and Harbors Appropriations Act.[4] The Corps issued a second cease and desist order in early 1987 to stop Leslie from placing fill on parcel 10. The Corps issued that order in response to Leslie's attempts to block a culvert that connected its property to the Newark Slough.

[2]Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a) (1982), provides in pertinent part:

> The Secretary [of the Army] may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

[3]Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a) (1982), provides in pertinent part:

> Except as in compliance with this section and section[ ] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

The Act defines fill as a pollutant at 33 U.S.C. § 1362(6).

[4]Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1982), provides in pertinent part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; . . . and it shall not be lawful to excavate or fill . . . any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

In sum, the Corps claimed jurisdiction over the majority of the property. Leslie challenged that claim of jurisdiction and filed suit; the Corps countersued. The district court found in favor of Leslie on all grounds, holding that the property was not subject to the Corps' jurisdiction. The United States appealed that decision. Save San Francisco Bay Association and the National Audubon Society intervened on behalf of the United States.

The Corps now asserts jurisdiction over the property based on two separate theories which apply to two distinct portions of Leslie's land. First, the Corps argues that most of parcel 10 and the southern tip of parcel 143 are adjacent wetlands that are part of the Corps' Clean Water Act jurisdiction.[5] To resolve this dispute we must first determine whether Congress intended that Clean Water Act jurisdiction should extend to property which government actions helped make aquatic. Because we find that it did, we then look to the Corps' regulations interpreting the Act, to determine whether they allow Corps jurisdiction. The Corps' second theory relates to the former crystallizers and calcium chloride pits. The Corps claims that these features are "other waters," as defined by Corps' regulations, that are subject to its jurisdiction.

STANDARD OF REVIEW

The district court's findings of fact are subject to a clearly erroneous standard of review. Issues of law, as well as mixed

[5]The Corps also claims that the southern portions of the property are affected by the ebb and flow of the tide, and thus are subject to the Corps' jurisdiction under the Clean Water Act and the Rivers and Harbors Act. See 33 C.F.R. §§ 328.3(a)(1), 328.4(b)(1) and 329.12(a)(2). *See also United States v. DeFelice*, 641 F.2d 1169, 1175 n. 15 (5th Cir. Unit A April 1981) (citing cases). Because we find in favor of the Corps on its wetlands claim, we do not reach this alternate argument.

questions of fact and law that involve consideration of legal concepts rather than essentially factual inquiries, are reviewable de novo. *United States v. McConney*, 728 F.2d 1195, 1200-02 (9th Cir.), *cert. denied*, 469 U.S. 824, 83 L. Ed. 2d 46, 105 S. Ct. 101 (1984).

When considering the Corps' interpretation of the Clean Water Act we defer to the agency's analysis if it is "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). The agency's interpretation of its own regulations is entitled to greater deference, amounting to a plain error standard. *Montana Power Co. v. EPA*, 608 F.2d 334, 345 (9th Cir. 1979); *Chemical Waste Management, Inc. v. EPA*, 277 U.S. App. D.C. 220, 873 F.2d 1477 (D.C. Cir. 1989).

THE SOUTHERN PORTIONS OF THE PROPERTY

The Corps claims that the southern portions of the property are wetlands within its jurisdiction.[6] The district court denied the Corps jurisdiction for three reasons: (1) the wetland conditions were caused by the government, (2) the conditions were not "normal," as required by 33 C.F.R. § 328.3(b), and (3) the property was not adjacent to waters of the United States, as required by 33 C.F.R. § 328.3(a)(7).

[6]The Corps initially claimed that almost all of the property qualified as a wetland. The United States only appeals the district court's determination as to the southern portions of the property, which the district court found had the physical characteristics of wetlands.

A. Governmentally Caused Inundation

We agree with the district court that Congress intended to create a very broad grant of jurisdiction in the Clean Water Act, extending to any aquatic features within the reach of the commerce clause power. *See Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 755 (9th Cir. 1978) (citing *California v. EPA*, 511 F.2d 963, 964 n. 1 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (1976)). However, the district court made an exception to this broad Congressional mandate and held that changes to the property *caused* by the government do not create jurisdiction. The court reasoned that a contrary holding would allow the Corps "to expand its own jurisdiction by creating some wetland conditions where none existed before." While this is a valid concern, the facts of this case do not present such a problem.

The district court relied upon *United States v. City of Fort Pierre*, 747 F.2d 464 (8th Cir. 1984). In *Fort Pierre*, the Corps asserted section 404 jurisdiction over a dry slough that had begun to exhibit wetland characteristics as a direct result of the Corps' dredging activity on a nearby river. The Eighth Circuit held that the Corps did not have jurisdiction due to the "peculiar facts and unique circumstances" of that case, in which "the Corps, as an unintended by-product of ordinary river maintenance, inadvertently create[d] a wetland-type ecological system on private property where no such system previously existed." *Id.* at 466, 481. The Eighth Circuit recently reaffirmed limiting Fort Pierre to these specific facts. *See United States v. Southern Inv. Co.*, 876 F.2d 606, 612 (8th Cir. 1989).

The factual situation in this case differs substantially from that in *Fort Pierre*. Here, the Corps was not directly and solely responsible for flooding Leslie's land: Caltrans constructed the culverts which allowed water to flow onto Leslie's property; Caltrans and the Fish and Wildlife Service

breached the levee on the wildlife refuge adjacent to Leslie's property which allowed water to flow up the culverts; Caltrans and the Fish and Wildlife Service failed to place effective floodgates on the culverts; Leslie itself maintained floodgates which unknown third parties propped open. Contrary to the district court's conclusion, the Corps did not itself create the wetland conditions and thereby attempt to expand its own jurisdiction.[7]

The fact that third parties, including the government, are responsible for flooding Leslie's land is irrelevant. The Corps' jurisdiction does not depend on how the property at issue became a water of the United States. Congress intended to regulate local aquatic ecosystems regardless of their origin. *See, e.g., Swanson v. United States,* 789 F.2d 1368 (9th Cir. 1986) (Corps construction of a dam creates waters under Corps jurisdiction); *United States v. Tull,* 769 F.2d 182, 184 (4th Cir. 1985) (federal construction of mosquito-control ditch creates waters under Rivers and Harbors Act jurisdiction), rev'd on other grounds, 481 U.S. 412, 414 n.1, 95 L. Ed. 2d 365, 107 S. Ct. 1831 (1987); *United States v. DeFelice,* 641 F.2d at 1175 (illegal and unauthorized acts of third parties can create Rivers and Harbors Act jurisdiction), *cert. denied,* 454 U.S. 940, 70 L. Ed. 2d 247, 102 S. Ct. 474 (1981); *Track 12 Inc. v. District Engineer, U.S. Army Corps of Engineers,* 618 F. Supp. 448, 449 (D. Minn. 1985) (state and locality construction of highway and sewage system creates Corps jurisdiction). If the Corps' regulations under Clean Water Act jurisdiction harm a landowner, her appropriate response is to seek damages through inverse condemnation proceedings, not to restrict the scope of Corps jurisdiction. *Riverside Bayview Homes,* 474 U.S. at 128.

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[7] All parties agree that the district court's statement that "the Corps flooded the wildlife refuge and thereby brought tidewater further inland," directly contradicts the record and its own statement of facts.

B. Normal Circumstances

The district court's second rationale for denying Corps jurisdiction over the southern portions of the property was a Corps regulation that defines wetlands as an area that "under normal circumstances" supports wetland vegetation. 33 C.F.R. § 328.3(b). Although the district court found the requisite wetland conditions, it held that "circumstances in those areas are not 'normal,' because the ability to support [wetland] vegetation was caused primarily by the government's flooding of the wildlife refuge across [the road]." The district court's interpretation of the "normalcy" requirement is tainted by its holding excluding governmentally created artificial waters from Corps jurisdiction.

The phrase "under normal circumstances" is meant to exclude those areas which are not aquatic, but experience an "abnormal presence of aquatic vegetation." 42 Fed. Reg. 37128 (1977). According to the district court's findings, the southern fringes of the parcel are aquatic areas. The fact that these wetlands are man-made does not make them "abnormal." Whether the wetlands are artificially or naturally created is irrelevant to this determination.

C. Adjacency

We disagree with the district court's third alternative holding, that this wetland is not adjacent to waters of the United States, as required by 33 C.F.R. § 328.3(a)(7). In reaching this conclusion, the district court again relied on its decision to exclude from consideration any consequences of the backflow through the culverts created by Caltrans and the Fish and Wildlife Service. In the absence of this erroneous holding, the southern portions of the property are adjacent to waters of the United States — the water in the culvert, which is directly connected to the Newark Slough.

THE CRYSTALLIZERS AND PITS

The Corps determined that the former crystallizers and calcium chloride pits qualified as "other waters" that were under Corps jurisdiction according to 33 C.F.R. § 328.3(a)(3). That section defines "waters of the United States" to include:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . .

The district court held that the crystallizers and pits were not described by this section for two reasons. First, because they are artificial structures and the regulation lists only natural formations. Second, the court concluded that the ponding was too temporary to qualify as other waters. The district court also addressed but did not decide the question of whether the property has a sufficient connection to interstate commerce.

A. Artificial vs. Natural Formations

The district court applied the doctrine of *ejusdem generis*[8] to construe the regulations to exclude artificially created waters. The court noted that all the waters listed as "other waters" in section 328.3(a)(3) were naturally created, and

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[8]The "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. . . . [The rule does not] apply when the context manifests a contrary intention. *Black's Law Dictionary*, 464 (5th ed. 1979). See also 2A *Sutherland Statutory Construction* § 47.17 at 103 (4th ed. 1973).

concluded that the artificially created crystallizers and calcium chloride pits could not be covered by that section. The *ejusdem generis* rule of statutory construction is used to illuminate the intent of the drafters; when the rule conflicts with other, clearer indications of intent, its results should be ignored. *See Weyerhaeuser S.S. Co. v. United States,* 372 U.S. 597, 601, 10 L. Ed. 2d 1, 83 S. Ct. 926 (1963); *Black's Law Dictionary,* 464 (5th ed. 1979). Reliance on the rule is inappropriate in this case.

First, the district court's interpretation conflicts with other parts of the Corps' regulations which assert that the Corps generally has jurisdiction over man-made waters under both the Clean Water Act and the Rivers and Harbors Act. See 33 C.F.R. §§ 328.5, 329.8. The Corps also defines at least one of the features listed in section 328.3(a)(3) to include artificial waters. *See* 33 C.F.R. § 323.2(b) ("lake" includes "a standing body of open water created by artificially blocking or restricting the flow of a river, stream or tidal area"). In addition, the Corps' comments to the final regulations support the power of the Corps to assert jurisdiction over artificially created waters:

> [We] generally do not consider the following waters to be "waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States.
>
> * * *
>
> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which *are used* exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
>
> * * *
>
> (e) Water filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand or gravel

> *unless and until the construction or excavation operation is abandoned* and the resulting body of water meets the definitions of waters of the United States (see 33 C.F.R. 328.3(a)).

51 Fed. Reg. 41206, 41217 (1986) (emphasis added). These comments show that the Corps intends to exempt from its jurisdiction only those artificially created waters which are currently being used for commercial purposes, and that even those waters are subject to such jurisdiction on a "case-by-case" basis of review. The crystallizers and calcium chloride pits have not been used for commercial purposes for decades and so are not subject to even this limited exemption. Finally, courts have uniformly included artificially created waters in the Corps' jurisdiction under the Clean Water Act and the Rivers and Harbors Act. *See, e.g., Tull,* 769 F.2d 182 (mosquito-control ditch); *Stoeco Dev. Ltd. v. Dept. of the Army Corps of Eng'rs,* 701 F. Supp. 1075, 1078 (D. N.J. 1988) (artificially created wetland), *appeal dismissed,* 879 F.2d 860 (3rd Cir. 1989); *United States v. Akers,* 651 F. Supp. 320 (E.D. Cal. 1987) (same); *Track 12,* 618 F. Supp. 448 (same); *United States v. Ciampitti,* 583 F. Supp. 483 (D. N.J. 1984) (same), *affirmed,* 772 F.2d 893 (3rd Cir. 1985), *cert. denied,* 475 U.S. 1014, 89 L. Ed. 2d 307, 106 S. Ct. 1192 (1986). We reject the district court's interpretation of the regulations as creating a distinction between artificial and natural waters.

B. Temporary Water Formations

The district court also held that the crystallizers and calcium chloride pits were not other waters because they "are in fact dry most of the year." Due to the climate in the Bay Area, ponding only occurs during the winter rainy season. The seasonal nature of the ponding is no obstacle to Corps jurisdiction however, because the regulations specifically enumerate two seasonal water features as other waters: intermittent streams and playa lakes. *See Quivira Mining*

Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055, 88 L. Ed. 2d 769, 106 S. Ct. 791 (1986); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975).

The Corps' determination that the crystallizers and calcium chloride pits are similarly seasonal bodies of water within the meaning of the regulations is proper. We reverse the district court's contrary conclusion.

C. Interstate Commerce

The crystallizers and pits must still have sufficient connections to interstate commerce to come under the Corps' jurisdiction as "other waters." 33 C.F.R. § 328.3(a)(3). The Corps has adopted the following EPA criteria to determine when waters have sufficient ties to interstate commerce:

> [Waters]
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species. . . .

51 Fed. Reg. 41206, 41217. The district court failed to determine whether the crystallizers and pits meet these standards. The record showed however, that migratory birds (including many protected by Migratory Bird Treaties) and one endangered species may have used the property as habitat. The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species. *See Utah v. Marsh*, 740 F.2d 799, 804 (10th Cir. 1984); *Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F. Supp. 985, 991-95 (D.Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981). *See generally*

Hughes v. Oklahoma, 441 U.S. 322, 329-36, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979). We remand this issue to the district court to determine if the property has the requisite connections to interstate commerce.

CONCLUSION

The southern portions of Leslie's property meet both the statutory and regulatory requirements for the Corps to exert Clean Water Act jurisdiction over them. The fact that the government in part caused the inundation of the property is not of consequence. Similarly, the government's actions do not affect the normalcy or adjacency requirements of the regulations. As to the crystallizers and calcium chloride pits, their artificiality and temporary wetness pose no obstacle to Corps jurisdiction. We remand to the district court for a factual determination of the sufficiency of the property's connections to interstate commerce. Because the record reflects that the Corps' jurisdiction does not extend to the total property, we also remand to determine over which portion of the property the Corps has valid jurisdiction in light of this opinion's legal conclusions. Costs will abide the final determination.

REVERSED and REMANDED.

RYMER, Circuit Judge, concurring in part, dissenting in part:

I join in the majority's holding that the southern portions of Leslie's property meet the Clean Water Act requirements for Corps' jurisdiction. I disagree, however, with the majority's conclusion that the district court erred in its treatment of the crystallizers and calcium chloride pits.

The crystallizers and pits are seasonal bodies of water that derive their major source of water from rain. There is standing water in the crystallizers and pits during the winter rainy season, when the rain collects, until early to mid-spring, when all the water has evaporated. The rest of the

year the crystallizers and pits are dry. Although the majority is correct that "the seasonal nature of the ponding is no obstacle to Corps' jurisdiction," the cycle of ponding in the crystallizers and pits creates no hydrological connection with any other body of water. This fact distinguishes *Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985) and *United States v. Phelps Dodge*, 391 F. Supp. 1181 (D. Ariz. 1975). Even though three fish may have found their way into one of the ponds, there is nothing in the record to show that water flows directly or indirectly from the crystallizers or pits into another body of water.

That being the case, the district court correctly determined that the crystallizers and pits are not "other waters" within the meaning of section 328.3(a)(3). It is therefore unnecessary to reach the issue on which the Supreme Court has declined to rule, see *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 n. 8, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985): whether the Clean Water Act extends Corps' jurisdiction to waters that are not "adjacent to bodies of open water."[1]

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[1]The majority holds that "the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." Congress does have power under the Commerce Clause to regulate wildlife and endangered species. *Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F. Supp. 985 (D.Haw. 1979), aff'd 639 F.2d 495 (9th Cir. 1981) and *Hughes v. Oklahoma*, 441 U.S. 322, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1976) stand for that proposition. However the issue in this case is not whether Congress has the power under the Commerce Clause to regulate wildlife and endangered species, but whether Congress meant to extend Corps' jurisdiction under the Clean Water Act to the full extent of its commerce clause power. Specifically, it is: is it reasonable for Corps' jurisdiction to rest on the fact that migratory birds and endangered species may use the waters as a habitat? In *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984), the other opinion on which the majority relies, the lake was used for several purposes that established a connection to interstate commerce. It is unclear whether the *Marsh* court would have found a substantial enough effect on interstate commerce, and thus Corps' jurisdiction under the Clean Water Act, had the only connection to interstate commerce been that "the lake was on flyway of several species of migratory waterfowl . . . ." *Id.* at 803.

In addition, in *Riverside Bayview Homes* the Supreme Court held that since the Corps' asserted jurisdiction over adjacent wetlands was brought to the attention of Congress "through legislation specifically designed to supplant it" (Congress' consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving "interim improvements within the existing framework" of the Clean Water Act, H.R. Rep. No. 95-139 pp. 1-2 (1977)), and Congress rejected efforts designed to curb that jurisdiction, that was "at least some evidence of the reasonableness of the [Corps'] construction." 474 U.S. at 137. Such evidence of reasonableness does not exist in this case. The Corps issued new regulations governing its regulatory programs on November 13, 1986 in order to clarify the scope of the Section 404 permit program. The new regulations placed the definition of "waters of the United States" into a new Part 328 of Title 33 of the Code of Federal Regulations. As a further clarification, and as an addition to the old regulations, the new regulations stated that "waters of the United States" also include the following: areas which are "or would be" used as a habitat for migratory birds or endangered species. 33 C.F.R. § 328.3(a)(3). This 1986 addition to, or clarification of, the Corps' regulations was not considered during congressional debates on the Clean Water Act of 1977. Therefore, the evidence of reasonableness that the Supreme Court found regarding the Corps' regulations in *Riverside Bayview Homes* does not apply to the 1986 clarification of those regulations, in particular, the list that includes migratory and endangered species habitats.

APPENDIX E

LESLIE SALT CO., a Delaware corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA; JOHN O. MARSH, et al.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

LESLIE SALT CO., a Delaware corporation,
CARGILL INC., a Delaware corporation,
Defendants.

Nos. C-85-8615-CAL, C-86-4187-CAL

United States District Court,
N.D. California

September 29, 1988
As Amended January 11, 1989

OPINION

LEGGE, District Judge:

These cases were tried to the court, sitting without a jury. The cases were then argued and submitted for decision following the completion of briefing. The court has heard and reviewed the testimony of the witnesses, and has reviewed the designated deposition transcripts, the exhibits, the designated discovery responses, the record of the case, and the applicable authorities. This opinion constitutes the

court's findings of fact and conclusions of law, as provided in Rule 52(a) of the Federal Rules of Civil Procedure.

I. Parties

Leslie Salt Co., a Delaware corporation, is the plaintiff in C-85-8615 and a defendant in C-86-4187. Cargill Inc., a Delaware corporation, is the owner of Leslie Salt Co. and is also a defendant in C-86-4187. Those parties will jointly be called "Leslie" in this opinion. The United States of America is the plaintiff in C-86-4187 and the defendant in C-85-8615. The Secretary of the Army, the United States Army Corps of Engineers, and certain officers of the Corps of Engineers are also defendants in C-85-8615. The United States, the Secretary, the Corps and its officers are collectively called the "Corps." The Save San Francisco Bay Association, Inc., and the National Audubon Society were granted leave to intervene as defendants in C-85-8615.

II. Jurisdiction of the Court

There is no dispute between the parties as to the jurisdiction and venue of this court. Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1345, 1346, and 2201-2202, 33 U.S.C. §§ 406 and 1319(b). The property in dispute is located in this district, and venue is proper under 28 U.S.C. §§ 1391(b), 1391(e) and 1402, and 33 U.S.C. § 406 and 1319(b).

These actions arose when the Corps issued a cease and desist order to Leslie pertaining to Leslie's activity on certain property that Leslie owns in the City of Newark, California. The Corps asserted jurisdiction over the property under § 1344 of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and subsequently also asserted jurisdiction under § 403 of the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.* Leslie filed action C-85-8615 to contest the Corps' jurisdic-

tion over the property. The Corps then brought action C-86-4187 to establish its jurisdiction over the property under those two Acts, and claimed that Leslie had violated those Acts in connection with its activities on or connected with the property. The principal, but not the only, question to be resolved is whether the property is a "wetland" within the meaning of the applicable statutes and regulations, and hence is under the jurisdiction of the Corps.

III. Burden of Proof

Before trial the Corps moved for a bifurcation and stay of the action. The motion in essence asked this court to refer the central issue in this case — whether the property is under the jurisdiction of the Corps — to the Corps for its administrative decision. That decision would have then been reviewable by this court under the Administrative Procedure Act, 5 U.S.C. § 706. The record for that review would have been confined to the Corps' decision and its administrative record, and the review would have been under the limited standard of whether the Corps' decision was arbitrary, capricious, an abuse of discretion, or contrary to law. This court denied that motion and determined that the issues should be tried as plenary actions in this court. *Leslie Salt Co. v. United States*, 660 F. Supp. 183 (N.D. Cal. 1987).

At trial, the Corps acknowledged that the burden of proof in this plenary civil trial is the preponderance of the evidence. However, the parties disagree about what must be proved. Leslie contends that it has the burden of showing that the Corps lacks jurisdiction over its property. The Corps contends that Leslie must prove that the Corps' assertion of jurisdiction is arbitrary and capricious.

The basis for the Corps' argument is the well-settled principle that an agency's interpretation of a statute which it administers is generally entitled to substantial deference, as is the agency's interpretation of its own regulations. *Ford*

Motor Credit Co. v. Milhollin, 444 U.S. 555, 566, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980). Under this principle, the court must accept the agency's interpretation so long as it is "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985).

The court cannot determine whether the Corps has jurisdiction over Leslie's property with no reference at all to the Corps' interpretation of the applicable statutes and regulations. However, the Corps' interpretation is not entitled to prevail simply because it is not capricious or arbitrary. The issue is whether it "is *reasonable*, in light of the language, policies, and legislative history of the Act[s] for the Corps to exercise jurisdiction." *Id.* at 131 (emphasis added).

The standard of reasonableness requires evaluating the evidence in light of the language of the Clean Water Act, the Rivers and Harbors Act, and the applicable regulations under those Acts. That requires consideration of a number of factors, including the degree of the Corps' scientific or technical expertise necessarily drawn upon in reaching its interpretation, the consistency of the interpretation within the Corps, the length of adherence to the interpretation, and the explicitness of the Congressional grant of authority to the Corps. *See Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 910-911 (5th Cir. 1983).[1]

This is the standard which this court has followed in this case. The court emphasizes that this reasonableness standard does not affect the parties' evidentiary burdens in proving disputed factual issues. Deference does not require the court to accept the Corps' version of the evidence. And

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[1] If the court determines that the Corps has jurisdiction, certain decisions would then be made by the Corps under its administrative processes.

the facts stated in this opinion are found by this court to be facts by a preponderance of the evidence.

IV. The Role of the Court

Underlying the legal and factual issues to be decided in this case is the financial question of what use will be made of the property. It is obviously a valuable piece of commercial property, and Leslie seeks to develop it. By asserting jurisdiction, the Corps seeks to preclude or restrict that development, and in essence to maintain the property in its present undeveloped state.

This case therefore involves a balance between the rights of private property on the one hand, and the interests of the government and the public on the other. The scale for measuring that balance is defined by Congress in the Clean Water Act and the Rivers and Harbors Act.

The role of this court is not to sit as a super-ecologist. That is, it is not the function of this court to decide what *should* be done with the property in the best interests of ecological balance. If that were the court's function, this court would probably say that the San Francisco Bay Area has too much development and that more land should be left undeveloped. But that is not the court's function. This court's role is to define what Congress did under the Acts, to define what powers the Corps has been given by Congress and by the regulations, and to apply those definitions to the evidence which the court has heard about the property. In order to restrict or prevent Leslie's right to develop its property, the court must find from the evidence that the property is within the jurisdiction of the Corps under those Acts and regulations. That is the extent of the judicial power in this dispute.

V. The Property

The property is owned by Leslie. It totals one hundred fifty-three acres, divided by a road into two parcels of approximately one hundred forty-three acres and ten acres. Except where there is a reason to distinguish between them, both parcels will be collectively called the "property."

The property is located in the City of Newark, Alameda County, California. It is surrounded on all sides by roads and highways. The one hundred forty-three acre parcel ("parcel 143") is bounded on the north by State Highway 84, on the west by Thornton Avenue, on the south by relocated Jarvis Avenue, and on the east by Jarvis Avenue, with residential subdivisions of the City of Newark lying east across Jarvis Avenue. The ten acre parcel ("parcel 10") is located across relocated Jarvis Avenue to the south of parcel 143 and is bounded by Thornton and Jarvis Avenues.

Across Thornton Avenue to the west of the property is the San Francisco National Wildlife Refuge, situated on land which was previously taken from Leslie by condemnation action of United States. The nearest navigable water is Newark Slough, which is approximately one quarter mile from the southernmost tip of the property, and that point is approximately two miles from San Francisco Bay.

Parcel 143 consists of areas of differing characteristics which are important for purposes of this litigation. Approximately the eastern one-third of the parcel is pasture land. Located on the pasture land are two pits, which were formerly used by Leslie for the deposit of calcium chloride. The remaining two thirds of parcel 143 constitutes land surface which Leslie previously used as crystallizers for the manufacture of salt. The parcel has also been impacted by the construction of highways, a sewer line and ditches, and by plowing, as discussed below. There are no tributary streams or rivers either on or adjacent to the property. The

property has never been inundated by tides. The property is drained of water, and is subject to some backflow, through three culverts which run under Thornton Avenue. One is located at the southernmost tip of parcel 10, and runs under Thornton Avenue to Newark Slough. The second is located near the intersection of Jarvis and Thornton, and runs under Thornton Avenue onto the wildlife refuge. The third is located approximately halfway up Thornton Avenue, and also runs under Thornton Avenue and onto the wildlife refuge.[2]

For purposes of this case, the condition of the property must also include consideration of weather. The San Francisco Bay Area has what is called a Mediterranean climate. That is, rain is not consistent throughout the year, but occurs primarily in the winter months with little or no rainfall during the balance of the year. Since the climate is wet in one season and dry the remainder of the year, the amount of water on the property will vary over the year. As a result, observations and scientific tests on the "wetness" of the land will depend in part on when the observations and tests are made.

VI. History of the Property

The issue in this case is whether the property is subject to Corps' jurisdiction. That decision must be made by examining the characteristics of the property as it now is (or more accurately, as it was in 1985 when the Corps asserted jurisdiction) under the definitions of the Acts and the regulations. The inquiry is not the condition of the property at some prior time in its history. Nevertheless, some references to the history of the property are appropriate as being probative of its conditions today. Indeed, even the Corps argues that the formation of the soils in the geological history of the property is relevant to a determination of whether those soils are "hydric" today. The court will therefore briefly discuss the history of the property insofar as its general background is probative of the present condition of the property.

[2]This property is not of the same type or location as that discussed in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). The property in that case was, in its natural condition, marshland subject to the ebb and flow of the tide. The present property is not marshland. *Id.* at 745.

The property was originally acquired by Leslie's predecessors in interest in the late 1800s. A certain portion of the property, primarily the eastern one-third of parcel 143, has been used as pasture and grazing land for livestock since that time. In approximately 1919, Leslie's immediate predecessor in interest began to construct facilities on the property for the manufacture of salt. A railroad spur, a salt refining plant and related buildings were erected. Pits were excavated on the eastern one-third of the property for depositing calcium chloride.

The western two-thirds of the property was made into so-called salt crystallizers, which held salt brine during the final stage of the solar salt production process. The crystallizers were constructed on dry land, by excavating large shallow basins, and leveling and compacting the soil on the bottom to create a level and watertight surface. The excavated soil was used to build earthen levees around the crystallizers to form watertight earthen containers. During the years of their use by Leslie, saturated salt brine (which had been produced by Leslie's evaporation ponds located closer to San Francisco Bay) was pumped through the Coyote Hills and into the crystallizers. The salt then precipitated and settled onto the bottom of the crystallizers. The remaining liquid was drawn off, and the salt was harvested by large mechanical harvesters that ran across the floor of the crystallizers. The salt was then moved by railcars to a refining plant

located on the property. After each harvest of the salt, the crystallizers were drained, releveled, and recompacted.

By 1959 the use of the property to manufacture salt became uneconomical. Since 1959 (with the exception of some limited production in 1962 and 1968), no use was made of the crystallizers, and that portion of the property has remained dry, except when rainwater accumulates during the winter. Ponds temporarily form after rains, because the floor of the crystallizers has remained relatively watertight as a result of their construction and frequent compaction. Before being plowed in 1983, the crystallizers were generally devoid of any vegetation, due to the compaction and the high salinity of the soil resulting from their prior use in the manufacture of salt.

A dust problem resulted from the dry and barren condition of the crystallizers. Dust blew from their surface onto the neighboring housing tracts across Jarvis road. As a result, Leslie was cited for air pollution violations. In an attempt to control the dust problem, Leslie plowed the property in 1983 and 1985. The plowing had the obvious result of loosening the soil in the crystallizers and creating furrows. That loosening of the soil and creation of furrows resulted in conditions somewhat more hospitable to the growth of plants.

Two other acts of man affect the present character of the property. In the early 1980s, the Eastbay Dischargers Authority constructed a large sewer line across the property. The construction had the effect of disturbing the natural conditions and left fill and inundations on the property. Between 1980 and 1983, Caltrans constructed Highway 84 across the northern part of the property; relocated Thornton Avenue across the western portion of the property; and relocated Jarvis Avenue, dividing the property into the two parcels. These construction activities by Caltrans resulted in the creation of highways, roadbeds, ditches, and drainage

facilities, including culverts under Thornton Avenue. The Caltrans construction also breached a levy on the wildlife refuge and destroyed an inflow control that had prevented Newark Slough from flooding the refuge area. The Caltrans construction was also apparently responsible for the destruction, or the keeping open, of what had been a tidegate on one of the culverts under Thornton Avenue. Leslie has asked Caltrans to put a floodgate on one of the culverts, but Caltrans has declined because of the controversy over the issues in this case.

That is the present condition of the property. For purposes of this discussion and the Corps' claim of jurisdiction, the property can be discussed by reference to the following segments: (a) the western two-thirds of parcel 143, which is the former crystallizer area; (b) the eastern one-third of parcel 143, which has primarily been pasture land; (c) the calcium chloride pits dug on that eastern one-third; (d) parcel 10; and (e) the physical characteristics created by the Caltrans and the sewer construction.

What significance is to be given to the fact that certain of the present features were man-made? The Corps takes the position that this fact should be ignored. Leslie argues that the court should not consider the impact of changes that were made to the property by others without Leslie's consent.

The significant man-made changes to the property include the construction by Caltrans discussed above. In addition, the United States extended some of the drainage ditches across the wildlife refuge to Newark Slough, for the purpose of carrying tidewater onto the refuge in order to create a wetland environment there. Despite requests from Leslie, neither the United States nor Caltrans has installed effective tide control mechanisms on the culverts or ditches, with the result that some water occasionally reaches the edges of Leslie's property in the culverts and ditches. Leslie

has attempted to install floodgates on the ditches, but these mechanisms were either opened or removed by others.

The court agrees generally with the Corps that the impact of human activity is not, in the usual case, relevant to the Corps' jurisdiction under the Clean Water Act. If a water body is a "water of the United States," it does not matter how it came to be so. *See, e.g., United States v. Akers*, 651 F. Supp. 320, 322 (E.D. Cal. 1987); *Track 12, Inc. v. District Engineer*, 618 F. Supp. 448, 450 (D. Minn. 1985).

The situation in this case, however, is not typical. The reported decisions on the significance of man-made alterations have involved properties that were indisputably "wetlands," or were otherwise "waters of the United States." In addition, those cases did not involve acts of man that were taken without the consent of, and over the protest of, the owner of the property.

In this case, the Corps flooded the wildlife refuge and thereby brought tidewater further inland, reaching the edge of Leslie's property. Moreover, the Corps and Caltrans have refused to install tide control mechanisms that would prevent water from reaching the property, and the Corps has prevented Leslie from maintaining such devices. The Corps has in essence tried to expand its own jurisdiction by creating some wetland conditions where none existed before.

Such actions by a government agency undermine the balance struck by Congress between regulation and private ownership. This court therefore concludes that the impact of backflow of water over the wildlife refuge and through the culverts and Caltrans drainage ditches should not be considered in determining the Corps' jurisdiction.

This conclusion is consistent with *United States v. City of Fort Pierre*, 747 F.2d 464 (8th Cir. 1984). In that case, a dry slough bed began to exhibit wetland characteristics as a result of the Corps' dredging activity on a nearby river. The

court held that the effects of the acts of the Corps should be disregarded in determining Clean Water Act jurisdiction, because "to decide otherwise would allow the Corps to enlarge its jurisdiction beyond the scope originally intended by Congress." *Id.* at 467. This court believes that this principle applies in this case.

The government's reliance on *Swanson v. United States*, 789 F.2d 1368 (9th Cir. 1986) in this case is misplaced. In *Swanson*, the court held that when the Corps constructed a new dam, its jurisdiction was correspondingly extended to the new high water mark, however, in that case, Congress explicitly approved the dam construction. In this case, Congress did not approve the creation of wetland conditions on Leslie's property. The government argues that Congressional approval of the construction of the wildlife refuge authorizes an expansion of Corps jurisdiction over Leslie's property. However, Congressional approval of a project does not amount to a sanction for all consequences of the project, only those that are part of it. Congress approved a wildlife refuge of a certain dimension; it did not approve a wildlife refuge that was self-expanding. *Swanson* does not stand for the proposition that an agency can expand its own jurisdiction; it merely reinforces the truism that Congress may give, and Congress may take away, the regulatory jurisdiction of agencies.

VII. The Corps' Assertion of Jurisdiction

The events which led the Corps to assert jurisdiction over the property occurred in October 1985. Leslie began digging a feeder ditch and siltation pond on a portion of the former crystallizers. When the Corps became aware of this, a representative of the Corps visited the property and conferred with Leslie. The Corps then issued a telegraphic cease and desist order, and later a letter asserting jurisdiction.

A second event occurred in 1986-87 with respect to parcel 10. Leslie plugged one end of the culvert leading from that parcel to Newark Slough, in order to prevent water from backing up through the culvert and onto the parcel. The Corps objected to that activity and issued a cease and desist order.

Although Leslie contests the Corps' jurisdiction to issue those cease and desist orders, Leslie has not taken any steps in violation of them while this litigation has been pending.

The Corps asserts jurisdiction over the vast majority of the property, under numerous subsections of the Acts and regulations; *see* exhibit 639. The actual extent of its claim of jurisdiction is marked on a map which is exhibit 640. Leslie denies that any of its property is subject to Corps jurisdiction. It admits that certain small portions in the southernmost tip of parcel 10 and in the southwest corner of parcel 143 may exhibit wetland conditions at certain times of the year, and that water occasionally backs up through the culverts and into the Caltrans ditches. However, as stated above, Leslie contends that those conditions should not be considered for purposes of this case, because they resulted from activities of the United States and Caltrans to which Leslie did not consent.

VIII. Rivers and Harbors Act

Has Leslie violated § 403 of the Rivers and Harbors Act, 33 U.S.C. § 401, *et seq*. That issue first of all depends upon whether Leslie's property is subject to the jurisdiction of that Act.

Section 403 in essence prohibits the "creation of any obstruction . . . to the navigable capacity of any of the waters of the United States," and the alteration of the condition or capacity of any "navigable water of the United States." A general definition of the term "navigable waters of the

United States" is set forth in 33 C.F.R. § 329.4. And the extent of Corps' jurisdiction under the Act and the regulation has been interpreted in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). As interpreted by the Ninth Circuit, the Corps' jurisdiction under that Act extends only to the portions of property that are "covered by the ebb and flow of the tide to the mean high water mark . . . in its unobstructed, natural state." *Id.* at 753.

The evidence established, and the Corps concedes, that none of Leslie's property is below the mean high water line, except certain elevations in the culverts under Thornton Avenue and in certain low-level portions of the drainage ditches constructed by Caltrans. However, the court has concluded for the reasons discussed above that the impact of these structures should not be considered in determining the extent of the Corps' jurisdiction over Leslie's property.[3] The court also finds that even if the culverts and ditches were considered, the evidence is not sufficient to establish that Leslie's property is subject to the jurisdiction of the Act as defined in *Leslie v. Froehlke*, above. Therefore, the court finds and concludes that the acts of Leslie did not violate the Rivers and Harbors Act.

IX. Clean Water Act

Congress passed what is now called the Clean Water Act in 1972, and has subsequently made several amendments. 33 U.S.C. § 1251, *et seq*. Congress did so acting under its Commerce Clause powers. It stated that its legislative objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress' concerns in the Act were

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[3] 33 C.F.R. § 329.8(a) should not apply when the artificial condition was created against the owner's consent.

obviously with pollution of the nation's *waters*, and not with all forms of pollution throughout the United States.

Under the Act, certain activities are prohibited or limited. Among those is "the discharge of any pollutant." 33 U.S.C. § 1311. And Congress defined "pollutant" to include the dumping of fill. 33 U.S.C. § 1362(6).

The primary section with which we are concerned in this case is section 404 of the Clean Water Act, 33 U.S.C. § 1344. In subsection (a), Congress gave to the Corps the power to issue permits, and necessarily to deny permits, for the "discharge of dredged or fill material into the navigable waters." Congress defined the term "navigable waters" to mean the "waters of the United States." 33 U.S.C. § 1362(7). Congress did not define the term "waters of the United States."

Congress therefore gave the Corps jurisdiction to regulate the discharge of fill into the "waters of the United States." This circuit has said that the jurisdictional terms of the Act are to be given the broadest possible interpretation under the Commerce Clause of the constitution. *Leslie Salt Co. v. Froehlke*, 578 F.2d at 755. However, the Ninth Circuit has not defined the maximum limits of the Corps' jurisdiction under the Act. *Id.* at 756. And it is obvious from the statute and the definitions of Congress that the Corps' jurisdiction does not extend to dry land; it extends only to that which is properly "waters of the United States."

As stated, neither Congress nor the courts have defined the term "waters of the United States." The Corps has defined that term in its regulations. 33 C.F.R. § 328. The regulation states that its purpose is to define "the term 'waters of the United States' as it applies to the jurisdic-

tional limits of the authority of the Corps of Engineers under the Clean Water Act." 33 C.F.R. § 328.1.[4]

The primary subsection with which we are concerned here is § 328.3, which defines the terms used to describe property subject to the jurisdiction of the Corps. It is necessary to study some of this language in detail, and the applicable portions of the regulations are set out below.[5]

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[4]Other regulations of the Corps, including the regulations dealing with the issuance of permits if the Corps has jurisdiction, are contained in 33 C.F.R. §§ 320-330.

[5]§ 328.3 Definitions.

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

. . . .

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

. . . .

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section. . . .

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-

The decisions to be made with respect to the regulations in this case are primarily ones of fact. That is, giving the Act and the regulations the broad interpretation defined by the U.S. Supreme Court and the Ninth circuit, does the evidence establish that the property is or is not within the definition of "waters of the United States?"

Before discussing the evidence and the language, the court notes that there are two conditions that clearly do not invoke the Corps' jurisdiction. First, land does not become a water of the United States just because water collects, ponds, and stands on land for a few days after a rain. Any land subjected to enough temporary rainfall will collect water which stands until it runs off or percolates into the ground. Such temporary collection of rain does not convert the land to a water. Second, land does not become a water of the United States simply because water drains off of the land and ultimately — through ditches, culverts, rivers, sewers, or the like — flows into waters of the United States. If such drainage made land "waters of the United States," then all property located on elevations, no matter how high, above a water of the United States would become "waters of the United States." But drainage off of land is not enough to make it a water of the United States. Not until flowing water becomes a "tributary" is it deemed to be a water of the United States, 33 C.F.R. § 328.3(a)(5), and the Corps does not contend here that the water that drains from Leslie's land is a tributary.

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made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

. . . .

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

The court turns now to an examination of the evidence and the portions of 33 C.F.R. § 328.3 under which the Corps claims that Leslie's property is a water of the United States.

A. The Ebb and Flow of the Tide

The first is § 328.3(a)(1). That includes "all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.4(b) provides that the tidal waters of the United States extend to the high tide line. The same term is used in section 328.3(d).

It is clear from the evidence that virtually all of Leslie's land lies above the high tide line. The property has never been inundated by tides. The only portions that are subject to any ebb and flow of the tide are low elevations in the ditches constructed by Caltrans, and certain small portions at the southernmost tip of the parcel 10 and the southwestern tip of parcel 143. That water gets there by backing up through one of the culverts running from the wildlife refuge under Thornton Avenue.

The Corps concedes that its jurisdiction does not cover drainage ditches that are dug on dry land. Regulation section 328.3(f) defines tidal waters as those that "rise and fall in a predictable and measurable rhythm." The tidal waters end "where the rise and fall of the water surface can no longer be practically measured." *Id.* The court finds and concludes that the water that does reach Leslie's land is not tidal water. The water comes from the bay, approximately two miles up Newark Slough, over the lands flooded by the United States for the wildlife refuge, and through culverts. The testimony of the government's witness that there might actually be tidal flow onto Leslie's property was not supported by sufficient objective data. And the court finds that any tidal impact cannot be practically measured.

As stated above, the court also believes that the principle stated in *City of Fort Pierre*, 747 F.2d at 467, is applicable

here. That is, it is primarily the flooded condition of the wildlife refuge across Thornton Avenue from Leslie's property that results in the flow of water through the culverts under the road. The evidence is clear that the property was not impacted by any inundation until the construction of the culverts. And since the United States created that condition by the flooding and maintenance of the wildlife refuge, it cannot assert jurisdiction as a result of its maintenance of that causal condition.

The court finds and concludes by a preponderance of the evidence that the property is above the high tide line and is not "subject to the ebb and flow of the tide."

B. Isolated Waters or Wetlands

The second subsection under which the Corps asserts that a portion of Leslie's property is a water of the United States is § 328.3(a)(3):

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

This subsection has come to be called the "isolated" wetlands or waters provision. The general thrust of this subsection is that certain waters or wetlands may be waters of the United States even though they are physically unconnected with other waters of the United States. The jurisdictional nexus for including such isolated waters within federal jurisdiction is stated in the three subsections of (a)(3); that is, some connection with interstate travel or commerce.

To establish that interstate connection here, the Corps relies upon comments made about § 328.3(a)(3) in the Federal Register where the Corps issued the final regulations. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). The comments state that the Corps adopts the definitions of the Environmental Protection Agency,[6] which includes consideration of the use of the property as habitat by migratory birds and endangered species. There was evidence at trial that the property is occasionally used by migratory birds, and one endangered species of mouse was found at one location on the property. The Corps' witnesses would extend that jurisdiction not only to *actual* use by migratory birds, but also to *potential* use. Leslie contends that Congress did not intend migratory birds or endangered species to be "interstate commerce" under the Clean Water Act, and that even if it did, such an extension of jurisdiction would not be constitutionally permissible.[7] However, this court need not reach those questions.

Before the interstate commerce connections are considered under the three subsections of (a)(3), the property must itself be "other waters" as described in section (a)(3). The Corps contends that the portions of the Leslie property which are such "other waters" are the calcium chloride pits and the former crystallizers during such periods as rainwater collects in them. The listing of "other waters" in section (a)(3) includes "lakes, rivers, streams . . . mud flats,

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[6] And the Environmental Protection Agency's general counsel opinion of November 19, 1985.

[7] The U.S. Supreme Court, in *Riverside Bayview Homes*, 474 U.S. at 131 n. 8, expressly declined to rule on isolated wetlands issues.

sand flats . . . sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds."[8] Giving those terms their common sense meanings, the court finds that neither the crystallizers nor the calcium chloride pits are "other waters."

Even if the phrase "such as" in front of those terms is interpreted, as it should be, to mean that the list is not exclusive, the definition of "other waters" is still limited to items of the same kind or class as those listed. See *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 600-01, 83 S. Ct. 926, 10 L. Ed. 2d 1 (1963); 2A *Sutherland Statutory Construction* § 47.17 at 103 (4th ed. 1973). The items listed are all natural water conditions, and not artificially created structures.

The calcium chloride pits and former crystallizers were dug for use in manufacturing salt. They are not natural water conditions and are in fact dry most of the year. Even if the regulation is interpreted as extending the definition to include artificially created water bodies, the mere ponding of water on otherwise dry land is not enough to convert that land into "other waters."

This conclusion finds support in the Corps' statements concerning the regulations. The comments to the final regulations promulgated in 1986 state, "For clarification it should be noted that we do not consider the following waters to be 'Waters of the United States.' . . . Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). The calcium chloride pits and former crystallizers are types of settling basins, and would not, under these comments, be considered "waters of the United States"

[8]The definition also includes "wetlands," which the court will discuss below under that specific provision of the regulation.

even if they were still operating and holding quantities of brine. The same conclusion is apparent when, as in recent years, water is no longer being pumped onto the property.

The court therefore finds and concludes that Leslie's properties are not "other waters" under 33 C.F.R. § 328.3(a)(3).

C. Wetlands

The Corps contends that virtually all of Leslie's property is a "water of the United States" because it is a "wetland." The Corps' jurisdiction over wetlands is contained in 33 C.F.R. § 328.3(a)(7): "Wetlands adjacent to waters . . . ." The term "wetlands" is defined in section 328.3(b) as

> those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Most of the evidence at trial focused upon whether Leslie's property meets that definition. Both sides generally agreed that in making that decision, three primary indicators must be examined: (1) the water on the property ("hydrology"), (2) the condition of the soils, and (3) the extent and nature of the plant life. Those evaluations are made more difficult by the fact that the climate has distinct rainy and dry seasons, and the observations will vary depending upon when the indicators are examined.

The various and interrelated subportions of the definition of "wetland" in section 328.3(b), and the evidence pertaining to them, will be discussed below. However, by first looking at that definition as a whole, it is apparent that the primary indicator is the vegetation. That is, the land must be

sufficiently wet for a sufficient duration to support a prevalence of vegetation which is typically adapted for life in saturated soils. Bare land does not meet the definition. And vegetation does not do so unless there is a prevalence of vegetation typically adapted for life in saturated soils.[9]

The first part of the definition requires that the area be "inundated or saturated."[10] It was clear from the testimony that the property as a whole is not inundated or saturated by any tidal or "wash" action. The source of inundation and saturation of this property, if there is any, can only be rain. It was also clear that the property could be called "inundated" only during and for a short time immediately after winter rains.

The term "saturated" is not defined by the statute or the regulations. But the witnesses appeared to agree on its definition; that is, containing water to a point where the soil can hold no more water and oxygen in the soil is shut out.

Experts on both sides conducted extensive tests of the hydrology and of the soils to make a determination as to whether the property is inundated or saturated. Various tests were used in an attempt to measure the hydrology and degree of saturation. The results of each of those tests, and the specific methods and measures used by the experts, need not be discussed in detail. In general, the studies included analyzing the type of soil, the amount of oxygen in the soil,

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[9]Some comment is appropriate regarding the term "vegetation." The testimony demonstrated that at certain times of the year algae or alginates form on certain areas of the property. However, the witnesses were unanimous in their conclusion that algae is not "vegetation." That term requires a morphological type of structure. And further, algae can form in a wet condition in a matter of a few days.

[10]It makes no difference in this definition whether the inundation or saturation is by surface water or by ground water.

the amount of water in the soil, the color of the soil, and the amount of reduction of other chemicals.

Water has to be present in the vegetation root zone (by whatever number of inches the depth of that zone is measured) in order for the area to be a wetland. The root zone of this property reaches levels of saturation only during the rainy season. After the runoff of each rain, the root zone is not saturated. Those conclusions are true as to the property as a whole. They are also true as to the crystallizers, whether examined before their plowing or after, except that plowing did increase the temporary puddling of rainwater. The Corps' evidence did not establish the existence of saturation in the root zone area.

The Corps also contends that certain soils on the property are "hydric" by reason of their geological definition. That is, geologists use that term in describing certain types of soil. But that definition generally pertained to soils in layers well below the root zone, and to the wetness conditions when those layers were laid down in long-past geological history. Use of the term "hydric soils" does not really assist in a determination of whether the root zone soil meets the requirements of the regulation.

The Corps also argues for application of the principle of capillary rise; that is, water rises by capillary action from the water table up into higher layers of the soils. The court is prepared to accept this principle of physics. But the evidence was that even capillary rise did not necessarily reach the soils in the root zone. And indeed, even areas affected by capillary rise do not necessarily reach a saturated condition.

The court finds from weighing and evaluating all of the evidence, both percipient and expert, that the property is not "inundated or saturated."

After a rain that is heavy or long enough, any soil will become temporarily saturated. But that is not enough for a

determination of wetland under the regulations. The regulations goes on to state that the saturation must be "at a frequency and duration" sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. 33 C.F.R. § 328.3(b). The court finds from an evaluation of the evidence that there is not such a frequency or duration. As stated, it is simply not enough that rain water collect on property for a few days for that property to become a water of the United States.

The next requirement under regulation 328.3(b) is that the inundation or saturation be sufficient to support, and "under normal circumstances" does support, relevant types of vegetation. The U.S. Supreme Court has noted that this excludes upland areas that for some aberrational reason have some wetland-type vegetation. *Riverside Bayview Homes,* 474 U.S. at 130 n.7. The Corps acknowledges that its jurisdiction should not extend to "abnormal" conditions, but should pertain to truly aquatic areas; see exhibits 205, 209, 574. The evidence of the "normal circumstances" of the property again focused on the hydrology, the soils, and the vegetation. The evidence included both the present condition of the property and some recent history. And again, the finding of "normal circumstances" is made difficult by the seasonal nature of the rainfall.

It is clear that the eastern one-third of the property, both historically and under present conditions, has been pasture land supporting primarily upland and not wetland vegetation. The area of the crystallizers was not able to support much vegetation of any type, because it had been highly compacted and because its use in the manufacture of salt resulted in very saline soil. This condition was changed somewhat by the plowing of the crystallizers, which made them more hospitable to plant life. However, even since then the plant life has been sparse and has been limited in duration to the rainy season. It is unclear whether the Corps

considers the "normal circumstances" to be before or after the plowing. But in either event, the court finds that the salt crystallizer area could not support the relevant types of vegetation under normal circumstances.

Some areas of the crystallizers have been disturbed by the Caltrans construction and by the construction of the sewer line, leaving those areas in an altered condition. The court is willing, as urged by the Corps, to consider those present conditions as "normal" circumstances. Even so considered, the evidence compels the conclusion that during the vast majority of the year there is little or no vegetation on the crystallizer area.

Two areas in the southern corner of parcel 10 and in the southwest corner parcel 143, as well as some of the Caltrans ditches, do support vegetation of the relevant type. But circumstances in those areas are not "normal," because the ability to support vegetation was caused primarily by the government's flooding of the wildlife refuge across Thornton Avenue. And those conditions in those very small areas, even if accepted as normal, are not reflective of the normal circumstances of the property as a whole.

The next requirement under regulation 328.3(b) is that the property support a "prevalence of vegetation . . ." There is a difference between the parties as to what the term "prevalence of vegetation" means. Leslie interprets the requirement to mean that in looking at the condition of the ground as a whole, there must be a prevalence of vegetation. On the other hand, the Corps interprets the phrase to mean that if there is any vegetation on the land, all that is required is that the prevailing vegetation be of a type which is adapted for life in saturated soil conditions. This court believes that the Corps' interpretation is not reasonable. First, the Corps' position would compel the conclusion that if there were only *one* plant on a large parcel of ground, but if that one plant were adapted for life in saturated soil, then

the entire parcel must be a wetland. That position defies the common sense meaning of the word "wetland." Second, the Corps' interpretation is contrary to its own guidance manual on making wetland determinations. The manual requires that *before* determining the issue of the type of vegetation, a finding must first be made that vegetation is the predominate condition of the property. Indeed, in other areas of the United States the Corps does not agree with the interpretation being advanced as to "prevalence of vegetation" in this case. Finally, the Corps' interpretation appears contrary to the definition of wetland in section 328.3(b) read as a whole. When all the subclauses of 328.3(b) are read together, it is clear that the predominate condition of the land must be vegetation, and that the vegetation must be plants that can live in saturated soil conditions.

Leslie contends that the prevalence requirement means that fifty per cent or more of the site has to be covered by vegetation. This court need not set any exact percentage requirement for prevalence, since it is clear from the evidence in this case that the prevalence requirement has not been met under any reasonable standard regarding the questioned portions of the property.

The court finds from the evidence that the salt crystallizer areas have not and do not support a prevalence of vegetation. This finding is based upon the testimony describing the property, the historical condition of the property leading up to the "normal" conditions of today, aerial photographs taken over a period of years, and the fields notes and reports of the experts who examined the area.[11] There was no plant growth in the calcium chloride pits. With respect to the crystallizers, it is clear even from the Corps' evidence that

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[11] At the time of the construction of the freeway, the U.S. Fish & Wildlife Department urged that the highway interchange be put where it is, in the middle of the former crystallizers, because that location for the interchange was one of very low environmental impact.

no plant life exists in some areas, and in other areas plants cover only up to one per cent of the ground. And many of the plant types identified by the Corps live only during the immediate rainy season and die shortly thereafter. The Corps' witnesses nevertheless testified that those plants were adapted for an annual life cycle that includes dormancy during long dry periods. However, this court questions whether plants that are dead for as much as nine months of the year can meet a "prevalence of vegetation" requirement.

The final clause in the definition of "wetland" requires that the prevalent vegetation be of a type "typically adapted for life in saturated soil conditions." Botanists divide plants into roughly five categories for purposes of determining such adaptation. Those categories define the likelihood of a particular plant being found in saturated soil conditions. They range from those which are found in saturated conditions ninety-nine percent of the time, to those which are not listed and hence are rarely if ever found in saturated soil conditions. Whether a specific plant falls into a particular category may depend upon who is preparing the list. But there is a high degree of consistency in most of the lists.

The court heard extensive evidence on the types of plants found on the property and the nature and characteristics of those plants. On the eastern one-third of the property, the prevalent vegetation is upland grasses which are typically not adapted for life in saturated soil conditions. A few plants of a type which are typically adapted to such soil conditions (either highly likely or at least a positive indicator) were found during rainy months in certain of the plowed furrows in the former crystallizers and along the Caltrans ditches. The damper areas on the southernmost tip of parcel 10 and on the southwestern corner parcel 143 also contained such plants.

The court finds from the evidence as a whole that Leslie's property does not contain a prevalence of vegetation which is typically adapted for life in saturated soil conditions.

The court therefore finds from the evidence and from the definition of "wetlands" in 33 C.F.R. § 328.3(b), that the Leslie property is not inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances it does not support, a prevalence of vegetation typically adapted for life in saturated soil conditions. It is therefore not a "wetland."

For a wetland to be a "water of the United States," there is an additional requirement. The wetland must also be "adjacent to waters" of the United States. 33 C.F.R. § 328.3(a)(7). The term "adjacent" is defined by subparagraph (c) of section 328.3 of that regulation. There was extensive testimony on whether various portions of Leslie's property, if found to be wetlands, were adjacent to waters of the United States. Since the court has concluded the property is not wetland, this adjacency requirement need not be discussed in detail.

Suffice it to say that the Corps' contentions on adjacency were built upon arguments using a jigsaw pattern of various areas of the property which, if deemed to be wetlands, could be "adjacent" to other areas of the property found to be waters of the United States. Most of those contentions have now been resolved against the Corps, because the contested areas were found not to be waters or wetlands.

One of the arguments of the Corps for adjacency is based upon the property that lies west of Thornton Avenue; that is, Newark Slough and the wildlife refuge, which are connected to the Leslie property by the culverts running under Thornton Avenue. The court finds and concludes that even if portions of Leslie's property were found to be wetlands, the adjacency requirement has not been satisfied. The reason is

that the condition which created the alleged wetland — that is, the flooding of the wildlife refuge and the resulting backing of water through the culverts — was contributed to by the United States itself and cannot under *City of Fort Pierre*, 747 F.2d 464, be considered in the adjacent wetlands determination.

The court therefore finds and concludes that the property is not a "water of the United States" as defined in 33 C.F.R. § 328, and hence is not within the jurisdiction of the Corps under the Clean Water Act.

X. Estoppel

Leslie also asserts that the Corps is estopped from asserting jurisdiction over the property. The argument is based upon actions which the Corps either did or did not take at the time of the Caltrans construction, the construction of the sewer, and the condemnation and use of the wildlife refuge. However, since the court has determined that the property is not "waters of the United States," and hence is not subject to the Corps' jurisdiction, the court need not consider this argument. The court is therefore making no findings of fact and expressing no opinion on Leslie's argument of estoppel.

XI. Attorneys Fees

Leslie has requested an award of attorneys fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). Since Leslie is the prevailing party, that statute requires an award of attorneys fees and expenses to Leslie unless this court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. The "substantially justified" standard requires only that the government's position must have been reasona-

ble in law and fact. *Pierce v. Underwood,* 487 U.S. 552, 108 S. Ct. 2541, 2549-51, 101 L. Ed. 2d 490 (1988).

While the court believes that some of the government's evidence and arguments were not reasonable, the court nevertheless concludes that the government's position as a whole was substantially justified and that special circumstances make an award to Leslie unjust. The Corps was motivated by a good faith concern for the objectives of Congress and for the Bay Area ecosystem. It was attempting to act in the public interest. The property has a high commercial value, and the amounts expended in this litigation are a very small percentage of its potential value. The government's evidence, although not meeting the burden of persuasion, does meet the burden of substantial justification for the action as a whole. The court therefore declines to award attorneys fees and expenses to Leslie, although Leslie is of course entitled to recover its costs of suit.

IT IS THEREFORE ORDERED that judgment should be entered as follows:

1. The Corps has no jurisdiction over the subject property under Section 10 of the Rivers and Harbors Act, because the property is not a "navigable water of the United States" within the meaning of the Rivers and Harbors Act or the regulations promulgated under that Act.

2. The Corps has no jurisdiction over the subject property under section 404 of the Clean Water Act, because the property is not a "water of the United States" within the meaning of the Clean Water Act or the regulations promulgated under that Act.

3. Leslie's work on the property did not and does not constitute a violation of the Rivers and Harbors Act or the Clean Water Act, and did not and does not require a permit from the Corps of Engineers.

4. In favor of plaintiff and against defendants and intervenors in action No. C-85-8615.

5. In favor of defendants and against plaintiffs in action No. C-86-4187.

Within fifteen (15) days of this order, Leslie is to submit to the court, and serve on the Corps, a proposed form of judgment that conforms to this opinion.

APPENDIX F

LESLIE SALT CO., a Delaware corporation,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, et al.,
Defendants,
and
SAVE SAN FRANCISCO BAY ASSOCIATION,
a non-profit California corporation;
NATIONAL AUDUBON SOCIETY,
a non-profit New York corporation,
Defendant-Intervenors-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

LESLIE SALT CO., a Delaware corporation;
CARGILL, INC., a Delaware corporation,
Defendants-Appellees.

Nos. 89-15244 and 89-15337

United States Court of Appeals,
for the Ninth Circuit.

D.C. Nos. CV-85-8615-CAL and CV-86-4187-CAL

Filed August 27, 1990

ORDER

Before FARRIS, PREGERSON, and RYMER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX G

[Order of this Court Denying Certiorari]

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

No. 90-792. *Leslie Salt Co., et al. v. United States.* The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is denied.

Justice WHITE would grant certiorari.

Reported below: 896 F.2d 354.

APPENDIX H

[Constitutional, Statutory and Regulatory Provisions Involved]

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3:

The Congress shall have Power . . . ;

* * *

To regulate Commerce with foreign Nations, and among the several States . . . .

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 553:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance o the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

CLEAN WATER ACT

Section 301(a), 33 U.S.C. § 1311(a):

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Section 309(d), 33 U.S.C. § 1319(d):

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title,[1] [footnote omitted] and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

Section 404(a), 33 U.S.C. § 1344(a):

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant

submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

Sections 502(7) & (12), 33 U.S.C. §§ 1362(7) & (12):

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

REGULATIONS OF THE CORPS OF ENGINEERS

33 C.F.R. § 328.3(a):

For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means

(1) all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers or recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

PREAMBLE TO THE PUBLICATION OF THE 1986 REGULATIONS OF THE CORPS OF ENGINEERS

51 Fed. Reg. 41217 (Nov. 13, 1986), in relevant part:

Section 328.3: Definitions. This section incorporates the definitions previously found in § 323.3(a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

Supreme Court, U.S.
FILED
AUG 14 1995
CLERK

(2)

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

No. 95-73

CARGILL, INCORPORATED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN FOREST & PAPER ASSOCIATION, INC. AND THE CHEMICAL MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE
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BRIEF OF THE AMERICAN FOREST & PAPER ASSOCIATION, INC. AND THE CHEMICAL MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amicus curiae the American Forest & Paper Association, Inc. is a non-profit trade association whose member companies grow, harvest, and process wood and wood fiber, and manufacture pulp, paper, and paperboard products and solid wood products. Its member companies account for over 8% of total U.S. manufacturing output. *Amicus Curiae* the Chemical Manufacturers Association is a non-profit trade association whose members represent 90 percent of the productive capacity for basic industrial chemicals in this country. The *amici* therefore have a vital interest in the regulation of "waters of the United States," as applied to temporarily wet areas that may be present on land owned or used by such companies and as applied to surface impoundments used in manufacturing and forestry.

The *amici* represent companies which own or lease extensive tracts of land used for large manufacturing facilities or for the production of timber, including approximately 71 million acres of forest land. In addition, these companies rely on timber from the over 250 million acres of private, nonindustrial forest land. These lands undoubtedly contain many isolated areas where topographical depressions occasionally collect rainfall runoff. The *amici* also represent companies which own and operate hundreds of man-made surface impoundments, used as water storage, treatment, or evaporation basins; cooling water or fire protection water ponds; log storage ponds; surface runoff sedimentation ponds; and the like.

If every such surface impoundment and every isolated, low-lying area were considered "waters of the United States" subject to regulation under the federal Clean Water Act ("CWA") merely because they have the potential to be used by migratory birds or endangered species, then these companies could find that their intended use of their lands and the continued operation of their man-made impoundments would be constrained by the U.S. Army Corps of Engineers ("Corps") and U.S. Environmental Protection Agency ("EPA") permit requirements.[1]

Thus, the *amici* have a direct and immediate interest in the issues presented in this case, which concern fundamental aspects of how the activities of their member companies may be subject to federal

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1 While this case concerns Corps regulations under section 404 of the CWA, 33 U.S.C. § 1344, the extent of "waters of the United States" also dictates EPA jurisdiction to require permits for discharges to such waters under CWA section 402, 33 U.S.C. § 1342.

regulation and whether they can reasonably know what conduct is prohibited. Moreover, since the Ninth Circuit's definition of "waters of the United States" is so broad and so vague that it could apply to almost any property, almost any of the *amici's* members (and countless other landowners) could be subjected to harsh civil or criminal penalties if the government chooses to assert that the member's particular property and activity fall under CWA jurisdiction.

Amici therefore can help provide this Court with a broader perspective on the pernicious effects that the Ninth Circuit's overextension of CWA jurisdiction, as well as its removal of the district courts' discretion to impose civil penalties, could have on manufacturing and forestry throughout the country.[2]

ARGUMENT

I. THIS COURT'S GUIDANCE IS NEEDED TO DELINEATE THE SCOPE OF CRITICAL AND FAR-REACHING FEDERAL WATER POLLUTION LEGISLATION

This case concerns the central issue in determining the applicability of virtually all of the regulatory controls imposed by the federal CWA, 33 U.S.C. § 1251 *et seq.* If an area is considered to be a "navigable water," defined to mean a "water of the United States" in CWA section 502(7), 33 U.S.C. § 1362(7), then the Corps has authority to restrict or

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2 Pursuant to Rule 37 of the Rules of this Court, the *amici* have obtained letters of consent to the filing of this brief from the parties and have filed those letters with the Clerk of the Court.

prohibit the discharge of dredged or fill materials into that area, under CWA section 404, 33 U.S.C. § 1344.

On the threshold question of whether wholly isolated "waters" fairly come within the meaning of "waters of the United States," the issue which this Court expressly reserved in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 n.8 (1985), the Ninth Circuit in *Leslie Salt II* implicitly concluded that they do, without any reference to legislative history or to any judicial decision involving a wetland or "other water" with no connection to navigable-in-fact waters.[3] The Ninth Circuit then removed essentially any limitation on the breadth of Corps permitting jurisdiction by concluding that any use (or apparently even potential for use) by migratory birds or endangered species is sufficient to bring an isolated "other water" within the reach of federal jurisdiction under the Commerce Clause.[4] The effect of these Ninth Circuit rulings is

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3 There is nothing in the objectives of CWA § 101(a), 33 U.S.C. § 1251(a), nor in the legislative history of the CWA, that suggests Congress intended to address areas which only occasionally collect water (or man-made excavations), if those areas have no potential impact upon traditional navigable waters or even on any other surface water body. Rather, the legislative history demonstrates that Congress was concerned about waters with some connection to and potential impact upon other surface waters. In discussing the geographic scope of the Clean Water Act, Congress spoke of a need to control the discharge of pollutants at its source because "water moves in hydrologic cycles," S. Rep. No. 92-414, 92nd Cong., 1st Sess. 77 (1971), but therefore concluded that controls must be applied "to the navigable waters, portions thereof, and their tributaries." *Id.*

4 This interpretation is particularly striking in light of the explicit recognition in the case below that "[t]here is no

that CWA permitting requirements could be applied to vast additional areas of the country, and potentially regulated companies and individuals have only vague guidance as to whether they are subject to the Act. This scant guidance was further beclouded by the Ninth Circuit's halting affirmation in *Leslie Salt IV*.

A. Identification as a "Water of the United States" Triggers Extensive Permitting Requirements

Under CWA section 404, 33 U.S.C. § 1344, a Corps permit is required in most instances prior to discharging dredged or fill materials into a "water of the United States." Under the Corps regulations, this means that a permit may be required for dredging of the area, grading or road construction, or even mechanically clearing the land. *See* 33 C.F.R. §§ 323.2-323.4 (1994) and, *e.g., Avoyelles Sportsmen's League, Inc. v. Alexander*, 473 F. Supp. 525 (W.D. La. 1979). Various forestry or farming practices may involve activities

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suggestion in the language of the Act that isolated waters used only by migratory birds fall within its ambit." 55 F.3d at 1394, Pet App. at A-11. There is nothing in the record to suggest that any use of an area by migratory birds or endangered species, no matter how insignificant, has a substantial impact on interstate commerce. The mere potential for such use is even further removed. Nor is there any reason to believe that areas which collect water only after heavy rainfall, or artificial ponds that are used for industrial or commercial activity, would be expected to have a substantial effect on migratory birds or endangered species, in any event. It is now clear that the commerce power does not reach activity which merely "affects" interstate commerce. There must instead be a showing that "the regulated activity 'substantially affects' interstate commerce." *U.S. v. Lopez*, 115 S. Ct. 1624, 1630 (1995).

which, if conducted on land considered to be "waters," would constitute the discharge of dredged or fill material, particularly during road construction, harvesting, and replanting.

The effect of a broad definition of "waters of the United States" extends even further, however. Under the Act, a permit is required for any addition of any pollutant to waters of the United States from a point source. 33 U.S.C. §§ 1311, 1342 & 1362(12). The regulatory definition of "waters of the United States" promulgated by EPA is virtually identical to the Corps' definition of the same term which was applied by the Ninth Circuit in the case below. *Cf.* 40 C.F.R. § 122.2 (1994) *with* 33 C.F.R. § 328.3(a) (1994). Thus, an area determined to be a "water of the United States" is not only subject to Corps permitting requirements for any discharge of dredged or fill material but also is subject to EPA CWA section 402 discharge permit requirements for any point source discharge of "pollutants" to the area.[5]

B. The Ninth Circuit's Interpretation of "Waters of the United States" Encompasses Vast Areas of Normally Dry Land

The definition of "waters of the United States" advanced by the Corps and accepted by the Ninth Circuit in the case below is so broad that it could be used to impose these Corps and EPA permitting requirements on the use of practically any land. The salt crystallizers at issue in the instant case were located in an area that had been pasture land in the past, 896

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5 "Pollutant" is defined very broadly in CWA § 502(6), 33 U.S.C. § 1362(6), encompassing a wide range of both process and non-process water discharges.

F.2d at 355, Pet. App. at A-39, and were "constructed on dry land." 700 F. Supp. at 480, Pet. App. at A-61. The temporarily wet areas "have no hydrological connection to any other body of water," and "for much of the year they do not even exist." 55 F.3d at 1395, Pet. App. at A-12.[6]

There is no reason to believe that Congress intended CWA jurisdiction to extend to the vast areas of the country where water may pond or soils may be saturated temporarily after rainfall or snowmelt on normally dry ground. As acknowledged even in the court below, "[c]learly the Act fails to mention isolated wetlands. And, to the extent it is relevant, neither does the Act's legislative history from 1972 and 1977." 55 F.3d at 1394, Pet App. at A-11. Even if it did, however, the Constitution would still require some connection to interstate commerce to authorize such action by Congress.

The Corps' interpretation at issue in this case, however, that an isolated "other water" has sufficient contacts with interstate commerce if it is "or would be" used as "habitat" by migratory birds or by an

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6 The district court in *Leslie Salt I* clearly rejected the Corps' assertion that the former salt crystallizers constituted "other waters" or "wetlands" because of occasional "ponding of water on otherwise dry land." 700 F. Supp. at 485, Pet. App. at A-73 to A-74. "After a rain that is heavy or long enough, any soil will become temporarily saturated. . . . [I]t is simply not enough that rain water collect on property for a few days for that property to become a water of the United States." *Id.* at 487, Pet. App. at A-77 to A-78. Yet the Ninth Circuit concluded in *Leslie Salt II* that the district court's findings were irrelevant for a determination of the Corps' jurisdiction over "waters of the United States." 896 F.2d at 360, Pet. App. at A-50.

endangered species, 51 Fed. Reg. 41,206, 41,217 (1986), is so broad that in practice it represents no limitation at all on Corps jurisdiction. Rather, it encompasses virtually all "waters" within the class of "waters of the United States" that the Corps asserts have sufficient ties to interstate commerce. The Corps' interpretation does not even require that migratory *water*fowl, or an endangered species with a water-based habitat, use or potentially use the site; in fact, the Corps has asserted jurisdiction over property because of its use by woodpeckers and songbirds. *See Tabb Lakes, Ltd. v. United States,* 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) (Table) (reported at 20 Envtl. L. Rep. 20008).[7] In short, it is difficult to imagine an area of land that could not be considered "waters of the United States" under this expansive, though concededly not congressionally foreseen, definition.

C. The Ninth Circuit's Interpretation of "Waters of the United States" Would Affect the Use of Private, Artificial Ponds and Impoundments

Since the Ninth Circuit would apply CWA permitting requirements to man-made waters created by excavating dry land, 896 F.2d at 359-60, Pet. App. at A-47 to A-50, its conclusion that use or potential use by

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7 This Court can take judicial notice of the fact that birds such as woodpeckers and songbirds could make use of practically any undeveloped property, regardless of whether any significant ponding of water occurs there. While not reaching the issue, the district court expressed "grave doubts that a property now so used, or seen as an expectant habitat for some migratory birds, can be declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction. . . ." 715 F. Supp. at 729.

migratory birds provides sufficient connection to interstate commerce affects the utilization of countless man-made surface impoundments. This expansive jurisdiction would include thousands of ponds and conveyances created for commercial or industrial purposes (*e.g.*, raw (intake) water settling and treatment ponds; process water evaporation ponds, similar to Petitioner's salt crystallizers; log storage ponds used in the manufacture of pulp, lumber, or solid wood products; ponds constructed for storage of fire protection water or process water; or settling ponds used to control rainwater runoff from mining, construction, commercial, and similar activities) and numerous other man-made bodies of water, with no connection to natural surface waters.

Since most such surface impoundments have at least the potential to be used in some way by migratory birds, Corps permit requirements would apply to dredging of such impoundments or construction within such impoundments, which activities are frequently necessary for their effective use. Moreover, EPA wastewater discharge permitting requirements under CWA section 402, 33 U.S.C. § 1342, would presumably apply to any point source discharge of "pollutants" *into* such ponds.[8] Yet, these impoundments have no connection to or potential impact on any other surface

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8 *See, e.g., Laguna Gatuna, Inc. v. Browner, et al.*, 58 F.3d 564, 565 (10th Cir. 1995) (EPA issued cease and desist order to company that disposed of wastewater without a discharge permit into a privately-owned sinkhole, which, by EPA's own admission, "was not hydrologically connected to other waters and there were no recreational, industrial or other uses that could affect interstate commerce," based solely on the presence of some dead migratory birds near the sinkhole).

waterbody and clearly fall outside the scope of waters that the CWA was meant to address.

While the Corps' regulations exclude certain "artificial lakes or ponds" under 33 C.F.R. § 323.3(b) (1994), this exemption is so limited that it is little comfort to a potentially regulated plant manager or landowner. Among other problems,[9] the exclusion is circular: since the exclusion only applies to "excavating and/or diking dry land," 33 C.F.R. § 323.3(b) (1994), and since virtually every area which collected rainwater even temporarily may be considered by the Corps to have been "a water of the United States" even prior to excavation or diking, in many cases the Corps could assert that an artificially created surface impoundment was not created on dry land but was created in a "water of the United States."[10]

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9 The Corps and the Ninth Circuit have asserted that this exemption would apply only to artificially created waters "which are currently being used for commercial purposes." 896 F.2d at 360, Pet. App. at A-49. Moreover, the Corps asserts the right "on a case-by-case basis to determine that a particular waterbody within these categories" of artificially created waters *is* a "water of the United States." Id. at 359, Pet. App. at A-48. Similarly, EPA has argued that its "treatment pond exception is simply notice to polluters that it will not generally regulate" discharges into waste treatment ponds, "not a promise that it never will." *Texas Municipal Power Agency v. EPA,* 836 F.2d 1482, 1488 (5th Cir. 1988).

10 Similarly, EPA has argued that its waste treatment exclusion does not apply to any system constructed in an area that previously fell within EPA's overly broad definition of "waters of the United States." *See West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991) (Table), 33 E.R.C. 1353. As a result, "EPA has not consistently applied the

D. The Ninth Circuit Has Provided an Impermissibly Vague Standard for Assessing Harsh Civil and Criminal Penalties

While the cost and regulatory burden imposed by the Corps' and the Ninth Circuit's expansive definition of "waters of the United States" represents a tremendous potential impact on *amici* and other businesses, municipalities, and private citizens, the impact is greatly magnified by the harsh civil and criminal penalties available under the CWA. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides for a civil penalty of up to $25,000 per day for a violation of the prohibition on unpermitted discharges, while CWA section 309(c), 33 U.S.C. § 1319(c), could impose a criminal penalty of up to $25,000 per day of violation or imprisonment for not more than one year, or both, for even negligent violations.

The United States has been vigorously prosecuting companies and individuals for placing fill material in areas which the government considers wetlands or other "waters of the United States."[11] In

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regulatory definition of navigable waters, creating uncertainty for the regulated community." House Comm. on Transp. and Infrastructure, H.R. Rep. No. 104-112, 104th Cong., 1st Sess. 147 (1995).

11 *See, e.g., U.S. v. Pozsgai,* Cr. No. 8800450-01, (E.D. Pa. July 13, 1989), *aff'd*, 897 F.2d 524 (3rd Cir. 1990) (Table), *cert. denied*, 498 U.S. 812 (1990) (individual sentenced to three years imprisonment and fined $200,000 for filling a wetlands without a permit); *U.S. v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989) (company fined $100,000 and its senior vice-president fined $10,000

fact, this Court recently denied a petition for *certiorari* in a case where, although the district court noted "the disturbing implications of the expansive" Corps definition of "waters of the United States," "[w]hich mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of 'discharging pollutants into navigable *waters* of the United States,'" nevertheless a father and son were each sentenced to 21 months incarceration for placing fill material on a waterfront lot that "does not have the appearance of what most lay people think of as a 'wetland.'" *U.S. v. Mills,* 817 F. Supp. 1546 (N.D. Fla. 1993) (emphasis in original), *aff'd*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1966 (1995).

The companies and landowners faced with these severe potential penalties, however, have been provided few, if any, objective criteria by which to determine whether the use of their land requires a Corps or EPA permit.[12] Individuals today are thus faced with a situation even more egregious than that which the district court found "disturbing" in *Mills*. While the lot in that case had no standing water and did not "appear to be" a wetland or a marsh, swamp, or bog, at least it was located adjacent to a bay and had a depression that sometimes carried rainwater runoff from inland to the

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and given a suspended six-month sentence with one year probation for filling in wetlands without a permit).

12 Indeed, in the government's Brief in Opposition to Leslie Salt's Petition for Writ of Certiorari to the Ninth Circuit in *Leslie Salt II*, the government declared that EPA and the Corps "have decided to institute rulemaking proceedings on the question of their jurisdiction over isolated waters." *Id.* at 19. Yet, over four years have passed without so much as a word from the agencies on the subject.

bay. 817 F. Supp. at 1548. After the lower court decision here, though, a felony conviction could be based on activities in an area that is not near any surface water body and is either excavated in dry land or is a depression that is only temporarily wet after rainfall. It may be enough that the area merely has the potential to be used by migratory birds or endangered species,[13] or there may be some undefined level of actual use required. And apparently that use need not even have any connection to water; the decision below places no such qualification on "endangered species" nor "migratory birds," and in fact the district court's findings of migratory bird use were apparently based in part on sightings of upland birds.[14]

In fact, this uncertainty has become more pronounced in the wake of the Ninth Circuit's opinions.

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13 In fact, the Corps has already asserted that its jurisdiction can be founded on such a speculative basis. *See, e.g., Leslie Salt I,* 700 F. Supp. at 485, Pet. App. at A-73 ("The Corps' witnesses would extend that jurisdiction not only to *actual* use by migratory birds, but also to *potential* use."); *Tabb Lakes, Ltd. v. United States,* 715 F. Supp. at 728 (Corps directive that "all waterbodies which are or reasonably could be used by migratory birds are waters of the United States"). And the dissent in the Fourth Circuit *Tabb Lakes* decision suggests that use by ducks and geese may be enough, but that use by robins and finches may not. 20 Envtl. L. Rep. 20008 at n.2 (4th Cir. 1989).

14 *See* Petition at 6 n.4. It does, however, make a difference whether the birds are in the Fourth Circuit or in the Ninth Circuit. *See* Corps memorandum included as Appendix E to the Petitioners' Brief (supporting its Petition for a Writ of Certiorari in No. 90-792), explaining that, as a result of *Tabb Lakes*, the Corps intends to apply its migratory bird theory everywhere *but* the Fourth Circuit.

First, an area can be a water even though it only occasionally collects rainfall on otherwise dry land. 700 F. Supp. at 485 & 487, Pet. App. at A-74 & A-77 to A-78, *rev'd* 896 F.2d at 360, Pet. App. at A-49 to A-50. Second, it is unclear whether such an area must only have the potential to be used by migratory birds or must be used in fact, as well as the required extent of that potential or actual use.[15]

In the aftermath of these decisions, it is unclear whether the rule reaches potential use by migratory birds and endangered species or only actual use by such animals. If only potential use is sufficient, or, as the Seventh Circuit put it, "the regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial," *Hoffman Homes*, 999 F.2d at 261, then clearly the Corps interpretation does not pass constitutional muster. *See United States v. Lopez*, 115 S. Ct. at 1630. If instead some more substantial, actual

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15 *Cf.* 896 F.2d at 360, Pet. App. at A-50 *with* 361, Pet. App. at A-51. *Cf.* 55 F.3d at 1392, Pet. App. at A-5 *with* 1394-96, Pet. App. at A-10 to A-14. The confusion is compounded by decisions in other Circuits such as in *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310, *vacated*, 975 F.2d 1554 (7th Cir. 1992) where the 7th Circuit emphatically held that EPA's asserted jurisdiction over wetlands based on the potential use by migratory birds exceeded the limits of the CWA and the Commerce Clause, only to subsequently vacate that decision without opinion. The Seventh Circuit later upheld the agency's asserted jurisdiction based on "potential" affect on interstate commerce, but held that the evidence did not support the conclusion that the wetland in question could potentially be used by migratory birds because, ironically, there was no evidence that birds in fact were using the wetland. *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261-62 (7th Cir. 1993).

use by migratory birds is required, then the *Leslie Salt* decisions and other cases addressing isolated waters have given no guidance on what use is sufficient.[16]

Simply put, the regulated community cannot ascertain the boundaries of the rule stated, applied, and restated in the *Leslie Salt* decisions. Such a nebulous and subjective standard for determining the applicability of the stringent civil and criminal penalties at issue here must be unconstitutionally vague.[17] *See, e.g., Connally*

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16 Even if something more than potential or minimal bird use is required by the regulation, that alone does not assure it is within the Corps' authority under the CWA or Congress' under the Commerce Clause. As noted in nn.3 and 4, *supra*, there is no legislative history indicating such a congressional intent or demonstrating that migratory bird use of isolated wetlands substantially affects interstate commerce. Nor is use by birds the type of commercial, economic activity normal within the commerce power. *See Lopez*, 115 S. Ct. at 1630-31.

17 The confusion surrounding the meaning of the *Leslie Salt* decisions is perhaps epitomized by the opinion of a federal district court (within the Ninth Circuit) concerning violations under the Clean Water Act. In *United States v. Suarez*, 846 F. Supp. 892 (D. Guam 1994), the court stated that *Leslie Salt II* "did not involve the issue of 'isolated' wetlands," and that the scope of CWA jurisdiction over isolated wetlands is "an unsettled area of the law." *Id.* at 893. In fact, emphasizing the "uncertain state of the law in [this] complex legal area," the court held that it was not unreasonable for defendant's counsel to fail to contest CWA jurisdiction over the isolated wetlands giving rise to the alleged violation. *Id.* at 893-94. Clearly landowners have not been fairly apprised of their obligations under the *Leslie Salt* decisions, when federal judges and CWA trial counsel appear baffled by their significance.

v. General Const. Co., 269 U.S. 385, 391 (1926) (statute which "forbids . . . an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law."); *Kolender v. Lawson*, 461 U.S. 352 (1983) (statute is unconstitutionally vague because it fails to describe with particularity what is required, encouraging arbitrary and discriminatory enforcement). The problem is aggravated by the fact that, after the Ninth Circuit's decision here, anyone who guesses wrong about the application of these uncertain and *ad hoc* criteria to his land is subject to a *mandatory* civil penalty.

II. THE MANDATORY PENALTY ASPECT OF THE NINTH CIRCUIT'S DECISION WARRANTS REVIEW IN AND OF ITSELF

The Ninth Circuit's determination, at 55 F.3d 1397, Pet. App. at A-16 to A-17, that a civil penalty must be imposed whenever a court finds a violation of the CWA has broad-reaching implications. It is also clearly erroneous and conflicts with holdings of the Fourth Circuit and several district courts.

The "mandatory penalty" aspect of the decision below obviously affects the tens of thousands of municipalities and industrial facilities that discharge wastewater to surface waters. The number of companies and individuals potentially subject to this mandatory penalty rule will be far greater, however, if the Corps' and EPA's expansive interpretation of "waters of the United States," as accepted by the Ninth Circuit, is allowed to stand. If any area of land that is wet for a minimal amount of time can be brought within CWA jurisdiction merely because it "may provide habitat to migratory birds" or endangered species, then countless landowners are in jeopardy of violating the CWA by filling or conducting work in an area they had no reason

to believe was a "water of the United States."[18] It is thus particularly inappropriate to ignore the rule of lenity (as discussed in Judge O'Scannlain's dissent below) and interpret CWA section 309(d) to impose mandatory penalties, since an individual may violate the statute merely because he failed to appreciate the counter-intuitive, case-by-case rule for determining jurisdictional "waters" that has now been endorsed by the opinion below.

The fact that the "mandatory penalty" ruling affects millions of businesses, municipalities, and private landowners subject to the CWA is reason enough for this Court to grant *certiorari*. In addition, though, the "mandatory penalty" decision below conflicts with the Fourth Circuit's decision in *State Water Control Board* v. *Train*, 559 F.2d 921, 927 (4th Cir. 1977) and dicta in this and other courts, as Cargill demonstrated in its petition. The decision is also clearly erroneous. As Judge O'Scannlain noted in his dissent below, the plain meaning of "shall be subject to" civil penalties is not the same as "shall pay" a civil penalty. 55 F.3d 1397-98, Pet. App. at A-17 to A-19. Even the

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18 EPA has acknowledged that its broad and uncertain assertion of CWA jurisdiction may result in EPA bringing an enforcement action for discharges to a water body that the discharger regarded as its own wastewater treatment system. National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, 58 Fed. Reg. 7610, 7620-21 (1993). As a result, "companies and individuals today live under a very real fear that cooling ponds and surface impoundments they are using for waste treatment may suddenly be determined to be navigable waters, and subject to the full panoply of Clean Water Act requirements". H. R. Rep. No. 104-112, 104th Cong., 2nd Sess. 158 (1995).

majority below acknowledged that "shall be subject to" civil penalties "[a]t first glance . . . would seem to mean that while violators are subject to penalty, they may or may not be fined--that is, penalties are discretionary with the district court." *Id.* at 1397, Pet. App. at A-16.

The lower court placed substantial weight on the fact that Congress used the word "may" in conjunction with administrative penalties under CWA section 309(g), 33 U.S.C. § 1319(g), while the word "shall" is used in conjunction with judicial civil penalties under section 309(d). This reasoning has two fatal flaws. First, the structure of the two provisions is very different, with the judicial penalty provision stating in passive voice what penalties a violator is subject to, and the administrative penalty provision stating in active voice the Secretary's or Administrator's authority to assess administrative penalties. Even the majority below admits that "shall be subject to" suggests "at first glance," that a penalty may or may not be imposed; on the other hand, if Congress had used "shall" instead of "may" in the administrative penalty provision in section 309(g)(1) ("shall. . .assess. . .a civil penalty"), it would have unambiguously required mandatory administrative penalties.

Secondly, the opinion below ignores the fact that CWA section 309(g) was added more than 14 years after section 309(d) was enacted in the original Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 314, 101 Stat. 46. Congress' use of the "Secretary. . . may . . . assess" structure in 1987 hardly suggests it intended the "any person who violates . . .shall be subject a civil penalty" formulation to have a different effect when it was drafted in 1972. Put another way, how could Congress have drafted section 309(g) any differently in the Water Quality Act of 1987 if it wanted to assure that the preexisting civil

penalty authority under section 309(d) would be understood to be discretionary rather than mandatory?

CONCLUSION

The Corps' assertion that "waters of the United States" includes isolated lands which are subject to only occasional saturation or ponding, or artificial ponds created on normally dry land, solely because those areas are or could be used by migratory birds or endangered species, is so broad as to subject vast additional areas of this country to Corps (and EPA) permitting requirements. The Corps and the Ninth Circuit have adopted an impermissibly vague and subjective standard for the crucial determination of whether CWA restrictions apply. Moreover, that nebulous standard directly conflicts with a decision of the Fourth Circuit. This Court's guidance is urgently needed to clarify the extent of federal jurisdiction under the CWA. There is also manifest need for this Court to review the critical and clearly erroneous conclusion below that district courts are constrained to impose a penalty for every CWA violation.

Respectfully submitted,

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(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CARGILL, INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Army Corps of Engineers' exercise of Clean Water Act jurisdiction over isolated seasonal ponds used by migratory birds rests on a reasonable interpretation of the Act.

2. Whether the exercise of Clean Water Act jurisdiction over isolated waters of the United States that are used by migratory birds is constitutional.

3. Whether language in a preamble to regulations implementing the Clean Water Act, which explains that the use of waters by migratory birds can establish the required nexus with interstate or foreign commerce to support federal jurisdiction, is subject to the notice-and-comment requirements of the Administrative Procedure Act.

4. Whether a court is required under Section 309 of the Clean Water Act to assess a civil penalty in every case in which the court finds a violation of the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-73

CARGILL, INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 55 F.3d 1388. The final judgment of the district court (Pet. App. A20-A26) is not reported. The most recent opinion of the district court (Pet. App. A27-A37) is reported at 820 F. Supp. 478. The opinion of the court of appeals on the initial appeal (Pet. App. A38-A53) is reported at 896 F.2d 354. The order of this Court denying the initial petition for a writ of certiorari (Pet. App. A88) is reported at 498 U.S. 1126. The initial opinion of the district court (Pet. App. A54-A85) is reported at 700 F. Supp. 476.

An earlier opinion of the district court on a procedural matter is reported at 660 F. Supp. 183.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1995. The petition for a writ of certiorari was filed on July 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Clean Water Act (CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a), 33 U.S.C. 1251(a). One of the chief goals of the CWA is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." § 101(a)(2), 33 U.S.C. 1251(a)(2). A major tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. §§ 301(a) and 502(12)(A), 33 U.S.C. 1311(a) and 1362(12)(A). The statute provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." § 502(7), 33 U.S.C. 1362(7). The Conference Report accompanying the legislation explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

Discharge of dredged or fill material into "navigable waters" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to

Section 404 of the CWA, 33 U.S.C. 1344. Regulations implementing the Corps' Section 404 permitting authority were first published on April 3, 1974. 39 Fed. Reg. 12,115 (1974). Those regulations defined the term "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1) (1974). See also 33 C.F.R. 209.260(e)(1) (1974) (explaining that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor").

The Corps' initial interpretation of the scope of its Section 404 jurisdiction met with substantial opposition. The Environmental Protection Agency (EPA) interpreted the CWA as a congressional assertion of significantly broader federal jurisdiction than would be encompassed by the traditional definition of "navigable waters." See *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 349-351 (1976) (letter from Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers).[1] As the Corps later explained, its initial regulations raised concerns about the lack of protection for "isolated

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[1] The EPA administers the CWA except as otherwise explicitly provided. § 101(d), 33 U.S.C. 1251(d). The Attorney General has determined that the "ultimate administrative authority to determine the reach of the term 'navigable waters' for purposes of § 404" resides with the EPA. 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979).

wetlands, and potholes whose degradation, destruction, and disappearance continues to increase at alarming rates." 42 Fed. Reg. 37,123-37,124 (1977). Several federal courts considering the coverage of wetlands adjacent to other waters agreed that the Corps had given Section 404 a more restrictive reading than was intended by Congress. See, *e.g.*, *United States* v. *Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974).[2] In *Natural Resources Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the court held that, when Congress enacted the CWA in 1972, it "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability." The court ordered the Corps to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act." *Ibid.*

In response to the district court's order in *Callaway*, the Corps promulgated interim final regulations providing for a phased-in expansion of its Section 404 jurisdiction. 40 Fed. Reg. 31,320 (1975); see 33 C.F.R. 209.120(d)(2) and (e)(2) (1976). The interim regulations revised the definition of "waters of the United States" to include, *inter alia*, waters that are not adjacent to navigable waters (sometimes referred

[2] Shortly after the *Holland* decision, the House Committee on Government Operations expressed the view that the Corps' narrow view of its jurisdiction under Section 404 did not comport with congressional intent. The Committee called upon the Corps to adopt the broader view taken by the EPA and by the court in *Holland*. H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974).

to as "isolated waters"). 33 C.F.R. 209.120(d)(2)(i) (1976). On July 19, 1977, the Corps published its final regulations, in which it revised the 1975 interim regulations to clarify many of the definitional terms. 42 Fed. Reg. 37,122 (1977). The 1977 final regulations defined the term "waters of the United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978).[3] The regulation in its current form contains substantially similar language. See 33 C.F.R. 328.3(a)(3).[4]

In 1986, the Corps consolidated and recodified its regulatory provisions defining "waters of the United States" for purposes of the Section 404 permit program. See 51 Fed. Reg. 41,216-41,217 (1986). The Corps explained that the new regulations neither reduced nor expanded the scope of its jurisdiction. *Id.* at 41,217. Rather, their "purpose was to clarify the

[3] An explanatory footnote published in the Code of Federal Regulations stated that "[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal Government's Constitutional powers to regulate and protect interstate commerce." 33 C.F.R. 323.2(a)(5), at 616 n.2 (1978).

[4] The current regulation defines "waters of the United States" to include, *inter alia*, "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3).

scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." *Ibid.* In its discussion of the regulations, the Corps observed that the "EPA has clarified that waters of the United States" include waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," as well as waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Ibid.*[5]

2. a. Petitioner Cargill, Inc., the corporate successor to Leslie Salt Co., owns a 153-acre tract of land southeast of San Francisco. The property abuts the San Francisco Bay National Wildlife Refuge and lies near Newark Slough, a tidal arm of San Francisco Bay. Pet. App. A2. Until 1959, Leslie Salt used the property for salt manufacturing. The eastern part of the property contains pits that were used to collect calcium chloride, and the western part contains shallow basins that were used for crystallizing salt. *Ibid.* During the winter and spring both the pits and the crystallizers fill with water. *Ibid.* Migratory birds use the ponds for habitat. *Id.* at A40.

b. In late 1985, the Corps learned that petitioner had begun discharging fill in connection with the construction of a ditch and a siltation pond on the property. Pet. App. A40-A41. The Corps issued a cease-and-desist order pursuant to its authority

[5] The Corps' discussion indicates that potential, rather than actual, use by migratory birds is sufficient to trigger the Section 404 permit requirement. See 51 Fed. Reg. 41,217 (1986) ("waters of the United States" include waters "which are or would be used" by migratory birds). In the present case, however, it is undisputed that the waters at issue are actually used by migratory birds.

under Section 404 of the CWA. Pet. App. A41.[6] Rather than apply for a permit, Leslie Salt filed suit, challenging the Corps' assertion of jurisdiction. *Id.* at A42. That suit was later consolidated with an enforcement action brought by the United States. *Ibid.*

After a trial, the district court ruled that the Corps had no jurisdiction over any of the property. Pet. App. A54-A85. The court concluded, in particular, that the crystallizers and pits were not encompassed by the "other waters" subsection, 33 C.F.R. 328.3(a)(3) (see note 4, *supra*), of the regulatory definition of "waters of the United States." Pet. App. A72-A75. The court explained that the areas in question "are not natural water conditions and are in fact dry most of the year." *Id.* at A74. Because it concluded that the areas at issue were not covered by the Corps' regulation, it declined to reach the question whether the assertion of federal jurisdiction over those areas, based upon their use by migratory birds or endangered species, would have been authorized by the CWA and permitted by the Constitution. *Id.* at A73.

The court of appeals reversed and remanded. Pet. App. A38-A53. The court concluded that neither the artificial origin of the crystallizers and pits nor their seasonal character excludes them from the regulatory definition of "waters of the United States." *Id.*

[6] The Corps asserted jurisdiction over some 110 acres of the property as adjacent wetlands. The parties subsequently agreed that the Corps had jurisdiction over 9 of those acres that are hydrologically connected to Newark Slough and subject to tidal inundation. See Pet. 5 n.3. An additional 80+ acres of "other waters" are no longer at issue. The present case concerns 12.5 acres of "other waters," where the former crystallizers and calcium chloride pits still lie.

at A47-A50. The court also concluded that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Id.* at A50. The court of appeals noted, however, that the district court had made no findings regarding the use of the property by migratory birds or endangered species, *ibid.*, and it remanded the case to permit the district court "to determine if the property has the requisite connections to interstate commerce," *id.* at A51.[7] Leslie Salt filed a petition for a writ of certiorari, which this Court denied. *Id.* at A88.

c. On remand, the district court found that roughly 12.5 acres were subject to the Corps' jurisdiction as "other waters." Pet. App. A5. The court noted that the evidence in support of its finding was "summarized in the United States' Memorandum on Remand." *Id.* at A30.[8] The court held that Leslie Salt had violated the CWA in three areas on the property

[7] Judge Rymer dissented, agreeing with the district court's conclusion that the crystallizers and pits were not "other waters" within the meaning of 33 C.F.R. 328.3(a)(3) and therefore were not subject to the Corps' Section 404 jurisdiction. Pet. App. A51-A53.

[8] The record before the district court established that 55 species of birds identified as migratory under 50 C.F.R. 10.13 use various habitats on petitioner's property. Fully two-thirds of the species observed on the site were water-associated birds (ducks, shorebirds, waterbirds and wetland birds). United States Memorandum on Remand at 22-23. The areas of standing water in the former crystallizers and calcium chloride pits receive "significant" numbers of shorebirds and ducks and provide perhaps the full daily requirement of habitat for certain species. *Ibid.*

by discharging fill or altering structures without a permit. *Id.* at A5, A31-A33. Finally, the court ruled that, under Section 309(d) of the CWA, 33 U.S.C. 1319(d),[9] imposition of a civil penalty is mandatory where a statutory violation has been found. Pet. App. A36. The court recognized, however, that the statute "vests wide discretion in [the district] court in setting the amount of the penalties," including the authority to impose "only minimal penalties." *Ibid.* The court deferred ruling as to the amount of the penalty pending receipt of "an appropriate motion for specific penalties" filed by the government. *Ibid.* The parties subsequently stipulated to a penalty of $50,000 and a restoration plan. *Id.* at A5. The stipulation preserved Cargill's right to appeal the issue of whether penalties are mandatory. *Ibid.*

d. A second panel of the court of appeals affirmed. Pet. App. A1-A19. The court first observed that, "[u]nder law of the case doctrine, * * * one panel of an appellate court will not reconsider matters resolved in a prior appeal," *id.* at A5, unless it concludes that the earlier panel's decision was "clearly wrong," *id.* at A8. With respect to each issue that had been resolved in the government's favor on the first appeal, the court unanimously concluded that the earlier panel had not been clearly wrong and declined to overturn the existing law of the case. *Id.* at A8-A14.[10]

[9] Section 309(d) states that "[a]ny person who violates" specified provisions of the CWA "shall be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. 1319(d).

[10] The court of appeals also addressed the question whether "the preamble to the 1986 regulations promulgated a rule without notice and comment as required by the Administrative Pro-

With respect to the question of penalties, which had not been addressed by the previous panel, the court of appeals affirmed. *Id.* at A15-A17. Section 309(d)'s use of the word "shall," the court reasoned, "means that civil penalties are mandatory." *Id.* at A16. The court noted, however, that "[d]istrict courts retain the broad discretion to set a penalty commensurate with the defendant's culpability," *id.* at A16-A17, including the authority to "assess a civil penalty of only a nominal amount," *id.* at A17. Judge O'Scannlain filed a partial dissent, asserting that Section 309(d) "should not be read to require civil penalties in all cases but only where the district court, in its discretion, finds them appropriate." *Id.* at A19.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court, or with any published decision of another court of appeals. Further review is not warranted.

1. Petitioner's "primary submission is that the migratory bird rule is inconsistent with any reasonable interpretation of the Clean Water Act." Pet. 16. We note, as an initial matter, that petitioner's fre-

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cedure Act" by identifying use by migratory birds as a sufficient basis for application of the Section 404 regulations. Pet. App. A8. The earlier court of appeals panel had not discussed the 1986 preamble in its opinion. The second panel concluded, however, that the prior panel had "implicitly rejected all arguments that the rule is invalid for procedural reasons under the Administrative Procedure Act." *Ibid.* The court held that "it is plausible to find that the preamble is merely an interpretive rule, and thus not subject to the notice-and-comment requirements of the Administrative Procedure Act," and it therefore rejected petitioner's claim on the basis of law of the case principles. *Id.* at A10.

quent references to "the statutory question" and "the migratory bird rule" (see, *e.g.*, Pet. 16, 22) conflate two distinct issues. First is the question whether the Corps may permissibly construe the term "waters of the United States" to include isolated waters whose destruction or degradation could affect interstate commerce. The second question is whether actual use by migratory birds of particular isolated waters establishes a sufficient nexus to interstate commerce to permit the Corps to exercise Section 404 jurisdiction pursuant to the "other waters" provision of 33 C.F.R. 328.3(a)(3). That aspect of petitioner's challenge is essentially coextensive with petitioner's constitutional claim.

a. Petitioner first contends (Pet. 17-19) that Congress's use of the phrase "navigable waters" precludes application of the CWA to the isolated waters at issue here. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court upheld the Corps' interpretation of the term "waters" to encompass wetlands adjacent to navigable waters and their tributaries. By defining "navigable waters" as "waters of the United States," the Court recognized, "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133. The Court made clear that "the term 'navigable' as used in the Act is of limited import." *Ibid.*

In petitioner's view, *Riverside* establishes only that the Corps may regulate "the *edge* of a plainly navigable waterbody, its *adjacent* wetlands." Pet. 17.

Petitioner acknowledges, however, that the focus of the CWA was not on navigability but on "keeping [waters] clean, or making them cleaner—for the benefit of the fish, the waterbirds, and the people who enjoy them." Pet. 19. Accord *Riverside*, 474 U.S. at 133 (noting "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems"); 33 U.S.C. 1251(a)(2) (one purpose of the CWA is to "provide[] for the protection and propagation of fish, shellfish, and wildlife"). Congress understood that concepts of navigability have nothing to do with protecting aquatic ecosystems, and that the Act's purposes require a scientific and functional interpretation of "waters of the United States" that is directly tied to the aquatic values sought to be protected. There is consequently no basis for limiting the Act's coverage to waters that are adjacent to navigable bodies.[11]

b. Petitioner also contends (Pet. 19-21) that the Corps' assertion of Section 404 jurisdiction over isolated waters is inconsistent with the CWA's legislative history. In fact, the history of the CWA's enactment in 1972 and of its amendment in 1977 strongly supports the Corps' approach. The Conference Re-

[11] Petitioner contends that the *Riverside* Court "twice pointedly distinguish[ed] and expressly declin[ed] to approve the Corps regulations extending jurisdiction to isolated waters and wetlands, like the site involved here." Pet. 17 (emphasis omitted). In fact, the Court in *Riverside* expressly declined to address the Corps' authority to regulate *wetlands* not adjacent to other bodies of water, since that question was not presented by the facts of the case. See 474 U.S. at 124 n.2, 131 n.8. The wetlands at issue in *Riverside*, however, were not themselves navigable or the result of inundation by frequent flooding of the adjacent navigable waters. See *id.* at 129-131.

port accompanying the 1972 legislation stated that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Representative Dingell, a co-sponsor of the House bill speaking shortly prior to the CWA's passage, noted with approval that the Act's definition of "navigable waters" "means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." 118 Cong. Rec. 33,756 (1972).

That understanding was confirmed by the legislative debates preceding the 1977 amendments to the Act. Congress in 1977 fully realized that the Corps' regulations covered isolated waters. In the House, Representative Abdnor expressed the understanding that under the regulations "the Corps must regulate all waters—from the smallest to the largest, including isolated wetlands and lakes, intermittent streams, and prairie potholes." 123 Cong. Rec. 34,852 (1977) (extension of remarks). Representatives who favored retaining the broad definition of jurisdiction under Section 404 emphasized the importance of protecting all waters and wetlands. Representative Lehman expressed the view that Section 404, as construed in the Corps' regulations, "is a key to the protection of drinking supplies, finfish and shellfish spawning grounds, wildlife nesting and breeding areas, and countless esthetic and recreation benefits." *Id.* at 10,415. In support of continued coverage of "inland wetlands," Representative Steers inserted a statement by the Chairman of the Council on

Environmental Quality pointing out that "[w]etlands, better known by such names as swamps, bogs, marshes, potholes, wet meadows and river outflow land," provide flood control, water purification, and "essential habitat in the life cycle of many birds and fish." *Id.* at 30,994-30,995.

The Senate bill did not attempt to restrict the Corps' broad assertion of jurisdiction. See S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977). Instead, the Committee incorporated the existing regulatory scheme into an amendment authorizing assumption by the States of some aspects of the Section 404 program. § 404(g), 33 U.S.C. 1344(g). The Senators clearly understood what was at stake. Senator Bentsen opposed the committee bill because it

> skirts the fundamental problem: the definition of Federal jurisdiction in the regulation of dredge and fill activities. The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies.

123 Cong. Rec. 26,711 (1977). Senator Tower similarly objected to affirming the Corps' regulatory scheme, "which," he said, "covers not just the rivers of the Nation but all surface waters and wetlands of the United States." *Id.* at 26,722.

As this Court observed in *Riverside*, "[t]he Conference Committee adopted the Senate's approach: efforts to narrow the definition of 'waters' were abandoned." 474 U.S. at 137. Congress determined that the Corps would retain jurisdiction over isolated waters; in addition, exemptions for discharges from activities such as the construction of stock ponds and sedimentation basins were created. H.R. Conf. Rep.

No. 830, 95th Cong., 1st Sess. 100-101 (1977). As Senator Baker explained:

> [T]he conference bill retains the comprehensive jurisdiction over the Nation's waters exercised in the [Clean Water Act] to control pollution to the fullest constitutional extent. A permit program will continue to regulate dredge or fill material discharged into all our Nation's waters.

123 Cong. Rec. 39,209 (1977). In sum, Congress "acquiesced in the administrative construction," *Riverside*, 474 U.S. at 136; its refusal to divest the Corps of jurisdiction over isolated waters is evidence of the reasonableness of the Corps' approach, "particularly where the administrative construction [was] brought to Congress' attention through legislation specifically designed to supplant it." *Id.* at 137; see generally *id.* at 135-137 (recounting history of 1977 amendments).

c. The Court in *Riverside* gave deference to the views of the Corps and the EPA, recognizing "the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters." 474 U.S. at 134. Petitioner acknowledges (Pet. 21) that the principle of deference to administrative agencies is generally applicable to the Corps' interpretation of the CWA. Petitioner contends, however, that little or no deference is warranted in the present case, on the ground that the Corps' assertion of regulatory jurisdiction based on the presence of migratory birds "involves a change of position that does not result from careful reconsideration based on experience, but is forced on the agency by the relentless pressure of two powerful Senators." Pet. 21 (citing *Oversight*

Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. (1985) (*1985 Oversight Hearings*)). That allegation is without basis. The record of the 1985 oversight hearings makes clear—as this Court recognized in *Riverside*, 474 U.S. at 134-135—that the Corps and the EPA had asserted regulatory jurisdiction over isolated waters on the basis of migratory bird use (among other factors) long before 1985. At issue in 1985 was the *manner* in which the Corps had been exercising that jurisdiction—specifically, by requiring evidence of actual (and in some cases extensive) use by migratory birds. *1985 Oversight Hearings* 122-123. The Acting Assistant Secretary of the Army for Civil Works made clear that "the Corps of Engineers generally does accept the notion that migratory waterfowl [use] does constitute a nexus with interstate commerce." *Id.* at 168. The question was simply "the extent of use by migratory fowl." *Id.* at 115; see also *id.* at 123 (the question is "how many ducks"); see also *Utah* v. *Marsh*, 740 F.2d 799 (10th Cir. 1984) (upholding assertion of Corps' jurisdiction over an intrastate body of water in part on the basis of migratory bird use); *1985 Oversight Hearings* 114, 121, 208. There is consequently no merit to petitioner's contention that the agencies' policy with respect to migratory birds represents a recent and/or unexplained departure from earlier practice.

In any event, petitioner does not contend that the Corps' assertion of Section 404 jurisdiction over isolated waters is of recent vintage. No such contention would be plausible: As early as 1977, the Corps' regulations defined the term "waters of the

United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978). Nor has petitioner suggested any other basis upon which this Court could decline to accord deference to the Corps' determination that isolated waters whose degradation or destruction could affect interstate commerce are subject to Section 404's permitting requirements. The question concerns the interpretation of a statute that the Corps (along with the EPA) is charged with administering; to the extent that the text and history of the Act fail to provide a definitive resolution, the agencies' construction of the phrase "waters of the United States" must be upheld so long as it is reasonable. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984).[12]

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[12] The courts of appeals have repeatedly held that Congress intended in the CWA to exercise the full extent of its Commerce Clause powers over the nation's waters, unlimited by traditional concepts of navigability. See, *e.g.*, *United States* v. *City of Fort Pierre*, 747 F.2d 464, 465 (8th Cir. 1984); *Utah* v. *Marsh*, 740 F.2d at 802 (citing cases); *United States* v. *Lambert*, 695 F.2d 536, 538 (11th Cir. 1983); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1211 (7th Cir. 1979); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979). Indeed, petitioner identifies no court that has accepted the contention that "waters of the United States" are limited to navigable waters and their adjacent wetlands. Petitioner's reliance (see Pet. 18-19) on *Federal Power Comm'n* v. *Union Electric Co.*, 381 U.S. 90 (1965), is misplaced. The Court in *Union Electric* indicated in passing that the term

d. Finally, there is no merit to petitioner's suggestion (Pet. 16-17) that this Court should avoid the constitutional issue presented in this case by construing the term "waters of the United States" as limited to navigable waters and their adjacent wetlands. The agencies charged with administration of the CWA have adopted a substantially broader reading of the pertinent language; Congress has acquiesced in that reading (see *Riverside*, 474 U.S. at 135-139); petitioner cites no decision adopting its reading of the statutory term; and the courts of appeals have repeatedly held (see note 12, *supra*) that Congress intended to exercise the full extent of its authority under the Commerce Clause. There is, moreover, no plausible *constitutional* objection to the Corps' assertion of regulatory jurisdiction over waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3). Petitioner's constitutional challenge is not to the Corps' determination that "waters of the United States" include isolated waters the use or destruction of which could affect interstate commerce. Rather, its constitutional challenge is limited to a single application of the "other waters" provision. Petitioner's contention that the presence of migratory birds affords an insufficient nexus to interstate commerce provides no basis for

"nonnavigable streams," as used in the Federal Water Power Act, encompassed "tributaries of river systems necessitating supervisory power to preserve or improve downstream navigability or water commerce generally." *Id.* at 97. *Union Electric* did not address (and indeed antedated) the CWA, and it construed the term "streams," rather than "waters."

invalidating the "other waters" provision in its entirety.

2. Relying exclusively on *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), petitioner contends (Pet. 15) that "the migratory bird rule, as applied here, reaches well beyond the zone of activity that affects interstate commerce" and is therefore unconstitutional.[13]

a. Migratory birds have long been viewed as an important article of interstate and foreign commerce. See *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983) ("The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'"); *Andrus* v. *Allard*, 444 U.S. 51, 63 n.19 (1979) (the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed").[14] "Throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds." *Hoffman Homes, Inc.* v. *EPA*, 999 F.2d 256, 261 (7th Cir. 1993). The courts have also recognized the importance of habitat protection as a means of preventing the depletion of bird populations. See, *e.g.*, *ibid.* (noting that "cumulative loss of wetlands has

[13] This Court's opinion in *Lopez* was submitted to the court below as a supplemental authority some four weeks before the opinion issued. See Pet. 9.

[14] See also *Cerritos Gun Club* v. *Hall*, 96 F.2d 620 (9th Cir. 1938) (regulation prohibiting baiting to lure migratory waterfowl in their migration is valid regulation of "commerce"); *Cochrane* v. *United States*, 92 F.2d 623, 626-627 (7th Cir. 1937) (recognizing Congress's power to regulate migratory birds under the Commerce Clause as "a national interest of very nearly the first magnitude * * * [that] can be protected only by national action") (quoting *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920)), cert. denied, 303 U.S. 636 (1938).

reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds"); *Fund for Animals* v. *Frizzell*, 530 F.2d 982, 986 (D.C. Cir. 1975) ("Research and experience have demonstrated that habitat is the key factor limiting most, if not all, migratory bird populations." (citation omitted)).[15] Indeed, petitioner cites no decision holding that protection of wildlife bears a constitutionally insufficient nexus to interstate commerce.[16]

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[15] See also Harold A. Kantrud *et al.*, U.S. Fish and Wildlife Service Biological Report 85(7.28), *Prairie Basin Wetlands of the Dakotas: A Community Profile* 46-55 (1989) (prairie pothole wetlands, frequently seasonal, provide important habitat for numerous species of waterfowl and other migratory birds). Indeed, migratory bird habitat protection has been deemed of such importance that several statutes and at least two international treaties address the problem. See, *e.g.*, The North American Wetlands Conservation Act, 16 U.S.C. 4401-4413 (Supp. V 1993); 16 U.S.C. 4401(b) (Supp. V 1993) (purpose of the Act is to enhance the protection of wetlands, which serve as habitat to migratory waterfowl and other birds, in effort to increase their populations); Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, United States-Japan, Mar. 4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990; Convention Concerning the Conservation of Migratory Birds and Their Environment, United States-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647, T.I.A.S. No. 9073.

[16] In *Palila* v. *Hawaii Dep't of Land and Natural Resources*, 471 F. Supp. 985, 994-995 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981), the district court held that Congress's power to regulate interstate commerce provided a constitutionally sufficient basis for the Endangered Species Act. The court noted Congress's finding that endangered "species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 471 F. Supp. at 994. It then observed that "a natural program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction." *Id.* at 995. Accord *Hoffman Homes*, 999 F.2d at 261 (protection of wildlife is valid basis for regulation under the Commerce Clause); *United States* v. *Sargent County Water Resource District*, 876 F. Supp. 1081, 1087 (D.N.D. 1992) (same). Cf. *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407 (1995) (upholding the Secretary of the Interior's interpretation of "harm" to endangered species to include "significant habitat modification or degradation where it actually kills or injures wildlife").

b. This Court's decision in *Lopez* is not to the contrary. Although the Court declined to permit an "additional expansion" of Commerce Clause power beyond that recognized in earlier decisions, see 115 S. Ct. at 1634, it overruled no precedents and emphasized the consistency of its approach with that of prior decisions, *id.* at 1629-1634. The Court reaffirmed, in particular, that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 1629-1630 (citation omitted).[17] The Court in *Lopez* thus did not call into question the

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[17] The particular regulated conduct at issue in this case, moreover, clearly constitutes economic activity. Petitioner (like its corporate predecessor Leslie Salt) wishes to fill the pits and crystallizers not so that the land can be put to personal use, but to facilitate the conduct of a commercial enterprise. See Pet. App. A58 (noting that the property in question "is obviously a valuable piece of commercial real estate, and Leslie seeks to develop it").

basis for the recognition in many prior decisions (see pages 19-20 and note 16, *supra*) that a potential deleterious impact on wildlife furnishes a constitutionally sufficient ground for regulation under the Commerce Clause.

c. Petitioner also contends (Pet. 15) that the filling of migratory bird habitat in this particular case would have no substantial impact on interstate commerce. It is a well settled principle, however, that "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (internal quotation marks omitted). The Court specifically reaffirmed that principle in *Lopez*, quoting with approval its prior statement that "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968) (quoted in *Lopez*, 115 S. Ct. at 1629).

The CWA and the Corps' regulations, moreover, do not establish an absolute prohibition on the discharge of pollutants into isolated waters frequented by migratory birds. The issue in this case is whether the Corps may, consistent with the CWA and the Constitution, assert *jurisdiction* over the waters in question. Where waters covered by the Corps' definition are "lacking in importance to the aquatic environment—or where [their] importance is outweighed by other values—the Corps may always allow development * * * simply by issuing a permit." *Riverside*, 474 U.S. at 135 n.9. Having eschewed any effort to obtain a permit, petitioner should not be

heard to attack the regulation on the ground that the proposed activity would have insubstantial effects on migratory birds. Cf. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186-194 (1985).[18]

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[18] Congressional power with respect to the conservation of wildlife generally, including migratory birds, has also long been upheld as a valid exercise of the federal government's authority to make and implement treaties. See Art. II, § 2, Cl. 2. In *Missouri* v. *Holland*, 252 U.S. 416 (1920), the Court upheld, against a Tenth Amendment challenge, a treaty between the United States and Great Britain providing protections for migratory birds. The Court also upheld the Migratory Bird Treaty Act of July 3, 1918, ch. 128, 40 Stat. 755, a statute designed to implement the treaty; the Court observed that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. Under a treaty with Japan, the United States has agreed to "endeavor to take appropriate measures to preserve and enhance the environment of birds protected under" the treaty and is obligated in particular to "[s]eek means to prevent damage to such birds and their environment." See Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, United States-Japan, Mar. 4, 1972, 25 U.S.T. 3335, T.I.A.S. No. 7990. The black-bellied plover, a species protected under the treaty with Japan, has been identified by petitioner's consultant as using the waters at issue. See 25 U.S.T. 3340; Tr. Exh. 597, Table 1, at 5. See also Convention Concerning the Conservation of Migratory Birds and Their Environment, United States-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647, 4653, T.I.A.S. No. 9073 ("To the extent possible, the Contracting Parties shall undertake measures necessary to protect and enhance the environment of migratory birds and to prevent and abate the pollution or detrimental alteration of that environment."); Convention Between the United States of America and the United Mexican States for the Protection

3. Petitioner contends (Pet. 23-24) that the "migratory bird rule" is invalid because it was not promulgated in accordance with the notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)-(d). That claim is without merit.

a. Regulations promulgated by the Corps in 1977 pursuant to APA notice-and-comment procedures unequivocally asserted Section 404 jurisdiction over isolated waters "the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978); see pages 4-5, *supra*. The agency made clear at that time that "[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal Government's Constitutional powers to regulate and protect interstate commerce." 33 C.F.R. 323.2(a)(5), at 616 n.2 (1978). If (as we contend) the presence of migratory birds furnishes a constitutionally sufficient nexus to interstate commerce, the waters at issue here were subject to the Corps' jurisdiction under the terms

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of Migratory Birds and Game Mammals, Feb. 7, 1936, 9 C. Bevans, *Treaties and Other International Agreements of the United States of America: 1776-1949*, at 1017, 1017-1018 (1972) (contracting parties "declare that it is right and proper to protect [migratory] birds * * * by means of adequate methods which will permit * * * the utilization of said birds rationally for the purposes of sport, food, commerce and industry"); 51 Fed. Reg. 41,217 (1986) ("waters of the United States" include waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties"). Application of Section 404's requirements to waters used by migratory birds is therefore a lawful means of implementing this country's treaties as well as a permissible exercise of the commerce power.

of the regulation itself. Neither the 1986 *Federal Register* preamble (see pages 5-6, *supra*) nor any statements of Corps officials at the 1985 oversight hearings (see Pet. 21, 24; page 16, *supra*)[19] created new duties or requirements; rather, the preamble and official testimony simply delineated the Corps' understanding as to the areas to which existing duties and requirements applied.[20] The 1986 preamble is therefore an interpretive rule—one that explains "what the administrative officer thinks the statute or regulation means," and "merely clarif[ies] or explain[s] existing law or regulations," *Alcaraz* v. *Block*, 746 F.2d 593, 613 (9th Cir. 1984); see also *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979)—and is not subject to the APA's notice-and-comment requirement. See 5 U.S.C. 553(b)(3)(A).

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[19] The court of appeals understood petitioner's argument to be that "the preamble to the 1986 regulations promulgated a rule without notice and comment as required by the Administrative Procedure Act." Pet. App. A8. The petition, however, refers to "the 1985 Subcommittee Hearings at which the migratory bird rule was invented." Pet. 21; see also Pet. 23-24 (arguing that "the adoption of the migratory bird rule in 1985 effected a new, and massive, extension of regulatory jurisdiction by the Corps of Engineers and EPA"). Those statements suggest that petitioners regard the testimony of Corps officials at the 1985 oversigh hearings as effecting the adoption of a substantive rule for which notice-and-comment procedures should have been utilized.

[20] Cf. *Hoffman Homes*, 999 F.2d at 261 ("it is reasonable to *interpret* the regulation as allowing migratory birds to be [the] connection between [waters of the United States] and interstate commerce") (emphasis added); *Rueth* v. *EPA*, 13 F.3d 227, 231 (7th Cir. 1993) ("one test for whether the [water] affects interstate commerce is whether migratory birds use the [water]").

b. There exists no circuit conflict warranting review by this Court. Petitioner relies (Pet. 23) on an unpublished decision of a split panel of the Fourth Circuit. *Tabb Lakes, Ltd.* v. *United States*, 715 F. Supp. 726 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (Table). In *Tabb Lakes*, the district court held that a 1985 memorandum issued by the Corps' headquarters to its district offices, explaining that bodies of water inhabited by migratory birds are subject to Section 404 jurisdiction, was a substantive rule that could be adopted only through notice-and-comment procedures. 715 F. Supp. at 728-729. The court of appeals, with one judge dissenting, issued an unpublished per curiam opinion "affirm[ing] on the district court's opinion." *Tabb Lakes, Ltd.* v. *United States*, 20 Envtl. L. Rptr. (Envtl. L. Inst.) 20,008, 20,009 (4th Cir. Sept. 19, 1989). Because the Fourth Circuit's opinion is unpublished, the conflict does not warrant this Court's review. Cf. Fourth Circuit IOP 36.6. Indeed, the Fourth Circuit has subsequently held that the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989), an interagency document providing guidance for the identification of wetlands subject to federal regulatory jurisdiction, was interpretive rather than legislative in nature. *United States* v. *Ellen*, 961 F.2d 462, 465-466 (4th Cir.), cert. denied, 113 S. Ct. 217 (1992).[21] The court reached that conclusion despite

[21] The *Ellen* court addressed the issue in the context of an Ex Post Facto challenge to a criminal conviction. 961 F.2d at 465-466. The court determined that the applicability of the Ex Post Facto Clause "depends on whether the *1989 Manual* is a legislative rule or merely an interpretive guide," *ibid.*, and it concluded that "the four agencies that promulgated the *1989 Manual* intended it to be only an interpretive guide to the regulatory definition of wetlands," *id.* at 466.

the fact that "[a]pplication of the *1989 Manual* resulted in a significant increase in lands identified as wetlands as compared with the EPA and Corps manuals." *Id.* at 465.

4. Finally, petitioner (Pet. 24-27) seeks review of the court of appeals' determination that imposition of a civil penalty is mandatory where a district court finds a violation of the CWA.

a. Section 309(d) of the CWA states that "[a]ny person who violates [Section 301 of the CWA] *shall* be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. 1319(d) (emphasis added). Section 309(d) further provides that "[i]n determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations," as well as other specified factors including "any good-faith efforts to comply with the applicable requirements" and "such other matters as justice may require." *Ibid.* The statutory language demonstrates that Congress intended civil penalties to be mandatory, and that equitable factors are to be considered only in determining the "amount" of the penalty.[22] Petitioner relies on dicta from a number of decisions (see Pet. 25-26), but it identifies no case holding that Section 309(d) permits a district court to decline to impose a civil penalty after a statutory

[22] Section 309(g)(1) of the Act, by contrast, which governs administrative penalties, provides that the EPA or the Corps "*may* * * * assess a * * * penalty," for violation of the statute or a permit. 33 U.S.C. 1319(g)(1) (emphasis added). That difference in the wording of another subsection of 33 U.S.C. 1319 further confirms the plain meaning of the provision at issue here.

violation has been found. The only other court of appeals squarely to address the question has held that imposition of a civil penalty is mandatory after a CWA violation has been established. See *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990) (plain language of Section 309(d) "makes clear that once a violation has been established, some form of penalty is required"); accord *Hawaii's Thousand Friends* v. *City & County of Honolulu*, 821 F. Supp. 1368, 1394 (D. Haw. 1993); *Atlantic States Legal Found., Inc.* v. *Universal Tool & Stamping Co.*, 786 F. Supp. 743, 754 (N.D. Ind. 1992); *Natural Resources Defense Council, Inc.* v. *Texaco Refining & Marketing, Inc.*, 800 F. Supp. 1, 22 (D. Del. 1992), aff'd in part, rev'd in part on other grounds, 2 F.3d 493 (3d Cir. 1993).[23]

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[23] We agree with petitioner (see Pet. 24-25) that *Stoddard* v. *Western Carolina Regional Sewer Auth.*, 784 F.2d 1200 (4th Cir. 1986), contains no unequivocal holding that civil penalties are mandatory under Section 309(d). Petitioner's reliance (see Pet. 25) on *State Water Control Board* v. *Train*, 559 F.2d 921 (4th Cir. 1977), however, is misplaced. In *Train*, Virginia officials sought a declaratory judgment that particular CWA restrictions were inapplicable to publicly owned sewage treatment plants that had not received federal grants. *Id.* at 922. The district court denied the requested relief, and the court of appeals affirmed. *Id.* at 923. In the course of its opinion, the court of appeals stated in passing that in CWA enforcement proceedings "the courts retain equitable discretion to determine whether and to what extent fines and injunctive sanctions should be imposed for violations brought about by good faith inability to comply with the deadline." *Id.* at 927. That statement was dictum, however, since *Train* did not involve either a judicial finding that a CWA violation had occurred or a request for civil penalties. In any event, the Fourth Circuit has subsequently read *Train* to hold only that a court has discretion to determine the amount of a penalty. See *Stoddard*, 784 F.2d at 1208-1209.

b. In any event, petitioner's claim does not warrant review by this Court. Judge O'Scannlain, who dissented on this issue, recognized that, "[u]ndoubtedly, civil penalties will be imposed in most cases of proven violations of the Act." Pet. App. A19. For its part, the majority observed that "[d]istrict courts retain the broad discretion to set a penalty commensurate with the defendant's culpability," including the discretion to "assess a civil penalty of only a nominal amount." *Id.* at A16-A17. Thus, the only practical consequence of this aspect of the court of appeals' decision is that in a small subset of CWA cases, district courts will assess nominal civil penalties rather than no penalties at all. The issue therefore does not warrant this Court's review (at least in the absence of a conflict in the circuits).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 95-73

In the

Supreme Court of the United States

October Term 1995

CARGILL, INCORPORATED,
a Delaware Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are

lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Attorneys for PLF have participated in numerous cases concerning the issues presented in this case, before this Court and other courts, representing amicus curiae and property owners. Included among these cases are *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *United States v. Lopez*, 514 U.S. ___, 131 L. Ed. 2d 626 (1995); and *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993).

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Supreme Court Rule 37.2, written permission from all parties to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

This case concerns whether it is any business of the United States government--specifically the Army Corps of Engineers (Corps)--that a property owner digs a ditch on its own property in California. The Corps thinks that petitioner Cargill, Incorporated's (Cargill), property contains "navigable waters" or "waters of the United States" because puddles of rainwater collect in man-made pits and basins on some 12.5 acres during the winter and spring. The Ninth Circuit agreed.

The property in question is located southeast of San Francisco, part of a 153-acre tract of land that was used by Cargill's corporate predecessor, the Leslie Salt Company, for the manufacture of salt. The previous owner of the land, sometime around 1919, began constructing facilities used for salt manufacture, including pits to hold calcium chloride and basins known as salt chrystallizers that are used in the last stage of production. *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 479-80 (N.D. Cal. 1988) (*Leslie Salt I*), Petition for Writ of Certiorari (Pet.) at A-61. The chrystallizers were shallow basins with compacted, watertight soil. These facilities were used to make salt until 1959, when the operations were discontinued as uneconomical and ceased but for brief times in 1962 and 1968. *Id.* at 480, Pet. at A-62. Seeking to make some use of the property it owns, in 1985 Leslie Salt started to dig a feeder ditch and siltation pond on a portion of the property, discharging fill in the process. The Corps caught wind of this and issued a cease and desist order under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*

The Corps claimed that Leslie Salt needed a permit under Section 404(a) of the CWA, 33 U.S.C. § 1344(a), for "the discharge of dredged or fill material into the navigable waters" of the United States. 33 U.S.C. § 1344(a); *see Leslie Salt Co. v. United States*, 55 F.3d 1388, 1391 (9th Cir. 1995) (*Leslie Salt IV*), Pet. at A-2. A similar controversy arose in 1987 when Leslie Salt attempted to place fill on its land to block a culvert. *Leslie Salt Co. v. United States*, 896 F.2d 354, 356 (9th Cir. 1990) (*Leslie Salt II*), Pet. at A-41. Leslie Salt filed a lawsuit challenging the Corps' jurisdiction, the Corps filed an enforcement action as a countersuit, and the District Court determined the Corps had no jurisdiction over petitioner's land. *Id.*, Pet. at A-42.

The Ninth Circuit reversed, holding that the facts that the puddles collected in artificial areas and were of a temporary duration were of no consequence to the Corps' jurisdiction. *Leslie Salt II*, 896 F.2d at 361; Pet at A-51. The Corps had argued that petitioner's land contained "waters of the United States," as defined in a Corps regulation to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1989), Pet. at A-93. The Corps interprets the regulation to extend to any waters "[w]hich are or would be" used as habitat by migratory birds which cross state lines or as habitat for endangered species. 51 Fed. Reg. 41,206, 41,217 (1986), Pet. at A-94. The Ninth Circuit in *Leslie Salt II* determined that the potential habitat connection is a sufficient connection to interstate commerce for the purposes of satisfying the regulation and establishing congressional authority under the Commerce Clause. U.S. Const. Art. I, § 8, cl. 2. *See Leslie Salt II*, 896 F.2d at 360, Pet. at A-50-51.

On remand, the District Court found that 12.5 acres of petitioner's land contained puddles under the Corps' jurisdiction, being connected with interstate commerce due to the use of the puddles by some 55 species of birds. *Leslie Salt IV*, 55 F.3d at 1392, Pet. at A-5 (citing *Leslie Salt Co. v. United States*, 820 F. Supp. 478 (N.D. Cal. 1992) (*Leslie Salt III*)). On appeal once again, the Ninth Circuit upheld this determination, accepting the argument that the use of land by migratory birds makes that land subject to the powers of Congress over interstate commerce. *Leslie Salt IV*, 55 F.3d at 1394-96, Pet. at A-9-14. Because the Commerce Clause power cannot reach such land, because the intent of Congress was not to reach such land, and because

the rule defining such land to contain "waters of the United States" was not properly adopted, the Ninth Circuit was wrong. Its ruling creates a general police power where none exists for the federal government under the United States Constitution. This ruling conflicts with Supreme Court precedent and raises important issues of federal law that should be resolved by this Court.

SUMMARY OF ARGUMENT

The Ninth Circuit has acquiesced in the extension of federal power far beyond that granted under the Commerce Clause. In upholding the "migratory bird rule," it has failed to employ the scrutiny required by this Court in its recent *Lopez* decision. The Ninth Circuit's ruling in effect creates a general federal police power under which federal officers can regulate puddles of water on private property based on the possibility that a bird might bathe there. Activities involving such puddles cannot have a substantial effect on interstate commerce.

The court below also failed to follow this Court's determinations in the *Riverside* case that the purpose of the Clean Water Act was to control pollution, not to provide recreational opportunities for birds. Finally, the Ninth Circuit looked the other way when confronted with a substantive rule adopted without the required public notice and comment. The Ninth Circuit decision potentially extends federal regulatory power over every piece of private land in this country and should be reviewed by this Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE DOES NOT EXTEND TO THE REGULATION OF ISOLATED INTRASTATE PUDDLES

Just last term, this Court in *United States v. Lopez*, 131 L. Ed. 2d 626, began to rein in the abuses of the commerce power justification for acts of Congress. This Court officially adopted as the "proper test" of asserted regulatory authority a required "analysis of whether the regulated activity 'substantially affects' interstate commerce." *Lopez*, 131 L. Ed. 2d at 637. The Ninth Circuit in *Leslie Salt II* did not employ this analysis, and instead assumed that "local waters which may provide habitat to migratory birds and endangered species" are subject to Corps' jurisdiction under the Commerce Clause. 896 F.2d at 360, Pet. at A-50. In *Leslie Salt IV*, the Ninth Circuit refused to disturb this prior ruling, on the basis that it was not "clearly erroneous." 55 F.3d at 1396, Pet. at A-14.

Like *Lopez*, this case involves the regulation of an activity for which no "substantial effect [on interstate commerce] was visible to the naked eye." *Lopez*, 131 L. Ed. 2d at 640. Jurisdiction over puddles that are not connected nor even near rivers, streams, creeks, or other bodies of water that the Clean Water Act obviously sought to protect was justified by the Ninth Circuit on the basis that birds

might frolic in these puddles. Only human beings connected with the property owner have access to these puddles. No hunters, photographers, or other sportsmen come to traipse through these puddles. *Leslie Salt IV*, 55 F.3d at 1396, Pet. at A-14. Yet, they are subject to Congress' Commerce Clause power--because of the birds.

What possible effect, let alone a substantial effect, on interstate commerce could result from placing dirt where these puddles form? Will one fewer puddle for birds to bathe in have some impact on the market for these birds? Is the placement of fill in such puddles the sort of "economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"? *Lopez*, 131 L. Ed. 2d at 642-43. Does the presence of such puddles have any appreciable impact on commerce, given the numerous other bodies of water and even puddles available to these birds? In this particular case, the birds have rather nice accommodations nearby--the San Francisco Bay National Wildlife Refuge. *Leslie Salt IV*, 55 F.3d at 1390, Pet. at A-2. The *Lopez* case made plain that such tenuous connections to interstate commerce should be carefully probed by the courts. 131 L. Ed. 2d at 641-43.

If the commerce power extends over puddles in which a bird might bathe, is there any limit to what Congress can regulate? Is the color of houses the next subject, since certain colors might deter birds from an otherwise cozy resting spot? Will the federal government regulate all noise levels on private property, since such decibel disturbances could affect the migrating birds? The parade of absurdity could go on and on, and at its head is this notion that isolated puddles cannot be disturbed by their "owners" without federal permission. Just like in *Lopez*, "[t]o uphold the Government's contentions here, [the Court] would have to pile inference upon inference in a manner that would bid fair

to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 131 L. Ed. 2d at 643.

The Ninth Circuit relied upon *Hughes v. Oklahoma*, 441 U.S. 322, 329-36 (1979), a case dealing with the interstate transportation of minnows, for the proposition that Commerce Clause power extends to the regulation of *potential* habitat of migratory bird or endangered species because Congress has Commerce Clause power over wildlife. *Leslie Salt II*, 896 F.2d at 360, Pet. at A-50-51. This is a seriously distorted gloss on *Hughes* that fails to put that case in its proper context--which was the ability of a state to impede interstate commerce in animals. *Hughes* has nothing to do with the question of whether or not all potential *habitat* for wildlife falls under federal Commerce Clause jurisdiction. *Hughes* merely found that once wildlife enters the stream of commerce (which usually occurs after killing or capture) a state cannot place burdens upon interstate commerce unless the traditional Commerce Clause burden tests are met. *Hughes*, 441 U.S. at 336.[1]

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[1] For a time there existed the belief fostered in the Nineteenth Century that once wild animals were reduced to possession, states retained some sort of title in those animals, and could prevent their introduction into interstate commerce. *See Geer v. Connecticut*, 161 U.S. 519, 530 (1896). As discussed in *Hughes*, this principle was eroded over time. In *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977), it was noted that a state's "title" over game animals was an anachronistic concept and could not be used by a state to discriminate against out-of-state fishermen. *See Hughes*, 441 U.S. at 334-35. Finally, in *Hughes* the controversy was put to rest: A state's interest in its wildlife and natural resources was not sufficient justification, *a fortiori*, for placing a burden upon interstate commerce. *Hughes*, 441 U.S. (continued...)

The proper test for determining whether a statute fits under the auspices of the Commerce Clause was outlined in *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981):

> A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.[2]

There is no showing whatsoever in the legislative history of the Clean Water Act that land use activities on isolated waters and wetlands affect interstate commerce. Congress nowhere found that the viability of migratory waterfowl or endangered species populations is dependent upon the preservation of such isolated wetlands. As explained in Argument II, *infra*, there is no indication that Congress even considered protection of migratory birds under this Act. Therefore, there is no rational basis to support the suggestion that the regulated activity of filling isolated puddles of water *substantially* affects interstate commerce. The second prong of the *Hodel* test is likewise suspect because the nexus between interstate commerce in migratory birds and wildlife has not been shown to be connected, reasonably or otherwise, to a permitting program on isolated

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[1] (...continued)
at 336. *But see* dissenting opinion of Chief Justice Burger and Justice Rehnquist in *Hughes*, 411 U.S. at 339-46 (*Geer* remains good law because the "ownership" theory is shorthand for a state's strong interest in conserving its resources).

[2] Obviously, *Lopez* has made clear that the effect on interstate commerce must be "substantial." 131 L. Ed. 2d at 637.

waters and wetlands. These isolated waters and wetlands have not been shown to contain significant reservoirs of animal habitat--and certainly have not been shown to be more habitable than any other area of thoroughly dry land.

Thus, even if Congress had intended to extend the reach of its jurisdiction to isolated waters, that reach would violate the limits of the Commerce Clause. This Court should grant the petition for writ of certiorari and settle the matter of whether the activity of placing fill in intrastate puddles substantially affects interstate commerce.

II

THE AGENCIES AND THE COURT BELOW HAVE EXTENDED THE SCOPE OF THE CLEAN WATER ACT BEYOND THAT INTENDED BY CONGRESS

Even if the Commerce Clause power extends to federal regulation of isolated wetlands, the assumption that Congress intended to regulate to the full extent of its Commerce Clause powers under the Clean Water Act is itself incorrect. The Corps and the Environmental Protection Agency (EPA)[3] have abandoned the express intent of Congress.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, this Court concluded that the Clean Water Act in general and Section 404(a) in particular were intended by

[3] The EPA has adopted an identical definition for "'waters of the United States.'" *See Hoffman Homes, Inc. v. Administrator*, 999 F.2d 260; *Leslie Salt IV*, 55 F.3d at 1394 n.2; Pet. at A-9 n.2.

Congress to combat the problem of water pollution.[4] *Id.* at 132. In its first look at this case, the Ninth Circuit failed to consider this Court's interpretation of Clean Water Act Section 404(a) as stated in *Riverside*. Instead, the court decided that the "waters" at issue were subject to Section 404(a), not because of the potential to cause water pollution, but solely due to the possibility that migratory birds might use the property. *Leslie Salt II*, 896 F.2d at 360, Pet. at 50-51. In its most recent consideration of this issue, the Ninth Circuit attempted to use *Riverside* to justify its approach, citing the connection between adjacent wetlands and the lifestyles of aquatic species and making the big leap of concluding that migratory birds are somehow in an analogous situation. *Leslie Salt IV*, 55 F.3d at 1395, Pet. at A-11-12 (admitting that this constitutes at best "some support" for the Corps' position).

In light of this Court's *Riverside* opinion, to the extent that the Ninth Circuit attempted to employ the two-step approach for analyzing agency interpretations of statutes as announced in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984),[5] its conclusions contradict those of this Court. This Court

[4] In *Riverside*, this Court said that any definition of "waters" subject to Section 404(a) must consider "the realities of the problem of water pollution that the Clean Water Act was intended to combat." *Riverside*, 474 U.S. at 132.

[5] In *Chevron*, the two-step approach referred to is: (1) if Congress has directly spoken to the precise question at issue, and Congress' intent is clear, the court must give effect to that intent; (2) if the statute and its legislative history are silent or ambiguous with respect to the specific issue, then the question for the court is whether the agency's interpretation is based on a permissible construction of the statute.

specifically stated that Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside*, 474 U.S. at 133. Thus, this Court found that Congress invoked *powers* under the Commerce Clause, but this Court did *not* rule that Congress invoked *all* its power under the Commerce Clause, as the Ninth Circuit held. A comprehensive reading of the legislative history indicates that Congress intended to regulate only water connected with *waterborne* commerce.[6]

In *Riverside*, this Court found that extending Corps' jurisdiction beyond open water to adjacent wetlands was reasonable due to the "evident breadth of congressional concern for protection of water quality," and the interrelated nature of navigable waters and adjacent wetlands. 474 U.S. at 133. Contrarily, the Corps has never shown that putting clean fill dirt in "other waters," namely isolated crystallizers and calcium chloride pits containing rainwater, impacts water pollution in any manner. Clearly, these waters do not connect hydrologically to any other water body. *Leslie Salt IV*, 55 F.3d at 1395, Pet. at A-12. Rather, the Corps asserts that these isolated "waters," which remain dry land most of the year, and other isolated wetlands must be protected as

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[6] *See* Jackson and Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act--The Riverside Bayview Decision, Its Past and Future*, 7 PUB. LAND L. REV. 21, 33 (1986). (Congress intended to limit Corps' jurisdiction to "all waters covered by the expanded judicial interpretations of [navigable waters], but no others.")

potential habitat or open space for wildlife pursuant to the Clean Water Act.[7]

The decision below holds that Corps' jurisdiction over an isolated "water" is reasonable due solely to migratory bird use--without any effect on water quality. Congress' clear intent was to grant the Corps' authority to combat water pollution; Congress never intended that mere use by migratory birds be used as the surrogate to extend Corps regulatory power to any wet area. Thus, the decision below violates this Court's admonition that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

III

THE MIGRATORY BIRD RULE IS A SUBSTANTIVE RULE IMPOSED IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

The court below upheld the Corps' definition of "waters of the United States," 33 C.F.R. § 328.3(a)(3), despite the failure of the Corps to promulgate the rule via

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[7] The Corps asserts this despite the fact that as recently as 1985, the Corps' civilian supervisor told Congress that: "One significant point to recall is that the Congress did not design Section 404 to be a wetlands protection mechanism and it does not function well in that capacity." Testimony of Robert K. Dawson, Assistant Secretary of the Army for Civil Works, Section 404 of the Clean Water Act: Oversight Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. 61 (1985).

notice and comment as required by the Administrative Procedure Act, 5 U.S.C. § 553. *Leslie Salt IV*, 55 F.3d at 1393-94, Pet. at A-8-10. The court tied its own hands in making this determination, under the cover of the "law of the case" doctrine. *Id.* As a result, the Ninth Circuit found it "plausible" that the definition was an interpretive rule rather than a substantive one, despite the fact that the definition by its very nature determines the scope of the Corps' power and jurisdiction. 55 F.3d at 1394, Pet. at A-10. Given the tremendous impact of such a rule on the rights of property owners throughout the country--whose lands can be regulated by the federal government if they contain puddles that birds might find attractive, there can be no doubt that the Corps' action extending its regulatory authority to isolated puddles of water is "one 'affecting individual rights and obligations.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). This Court should grant the petition for writ of certiorari to review the propriety of this rule.[8]

CONCLUSION

The federal commerce power is the power to regulate *interstate commerce*. This Court has held that a substantial affect on such commerce must be shown to justify assertions of congressional regulatory power. The asserted connection of puddles of water to migratory birds to interstate commerce

[8] Although brushed aside by the court below, *see Leslie Salt IV*, 55 F.3d at 1396 n.3; Pet. at A-14 n.3, the adoption of the migratory bird rule raises serious questions under the nondelegation doctrine. *See Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 672-76 (1980) (Rehnquist, J., concurring).

is illusory. Congress passed the Clean Water Act not for the convenience of birds, but to control pollution. The Ninth Circuit's decision in *Leslie Salt IV* allows the Army Corps of Engineers to make a federal case out of every piece of sand placed in any puddle in America. This decision is contrary to the Constitution and the laws of this nation. Amicus curiae urges this Court to grant the petition for writ of certiorari and rein in this source of certain regulatory abuse.

DATED: September, 1995.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

CARGILL, INCORPORATED,
a Delaware Corporation,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LANDOWNERS COMMITTEE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the extension of the United States Army Corps of Engineers' regulatory jurisdiction under the Clean Water Act to reach non-navigable isolated waters solely on the ground of their use by migratory birds oversteps the bounds of the Commerce Clause?

2. Whether the "migratory bird rule," as applied by the Corps and EPA over shallow, non-navigable seasonal "ponds" wholly unconnected to any other body of water, is invalid as inconsistent with any reasonable construction of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*?

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Thomas Jefferson, *Writings*, Vol. XIX 2

Mountain States Legal Foundation ("MSLF"), the Alliance for America, and the Fairness to Landowners Coalition respectfully submits this brief *amici curiae* in support of Cargill Incorporated, the Petitioner for *writ* of *certiorari*.[1]

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The Alliance for America ("Alliance") is a fifty-state network of nearly five hundred independent grassroots organizations, whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and political interests including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally protected property rights resulting in family and community despair.

The Fairness to Land Owners Committee ("FLOC") is a Maryland-based, national organization with over 18,000 members who are property owners faced with confiscatory land-use regulations involving a number of federal and state statutes. FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's own land, and is active in educating the public and lawmakers about the difference between conservation and confiscation.

MSLF is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural

---

[1] *Amici* have obtained the written consents of the parties. The written consents have been provided to the Clerk of the Court.

resources and, as a result, are actively involved in many environmental issues.

Many of *amici*'s members are engaged in farming and ranching activities across the country. Farming and ranching have long been recognized as the backbone of this nation:

> Whenever there are in any country uncultivated lands and unemployed poor it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for men to labor and live on. . . . The small landowners are the most precious part of the state.

Thomas Jefferson, *Writings*, Vol. XIX, p. 17.

As demonstrated herein, the implications of the Petitioner's case far transcends the Petitioner's individual situation and is indicative of problems of nationwide magnitude. This case presents serious questions of how individual rights are to be protected from governmental excesses, both in the enforcement of laws, for the ostensible protection of the environment, and the administration of justice. *Amici* believe it is vitally important for this Court to protect these individual freedoms in the face of increasing civil and criminal enforcement under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq*.

Amici's interests in the outcome of this lawsuit are directly tied to their members' private property rights. *Amici* have serious concerns that the ruling of the Ninth Circuit does violence to precedents written by this Court that recognize the constitutional limitations of our federal government.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amici hereby adopt Petitioner's statement of the case and description of the opinions below, jurisdiction, and statutes involved.

SUMMARY OF THE ARGUMENT

This case presents this Court with an extremely important constitutional issue on the reach of federal jurisdiction under

the Commerce Clause that has grave consequences for thousands of private property owners whose farms, back yards, or one-quarter acre lots are subjected to strict and overly burdensome federal land-use control under the CWA. However, the CWA is not a federal land-use statute, its purpose is to protect water quality. The Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") have assumed jurisdiction under the CWA that, given their penchant for overregulation, has caused them to regulate private property without any nexus to interstate commerce.

REASONS FOR GRANTING THE *WRIT*

I. INTRODUCTION: SECTION 404: THE GOVERNMENT'S PENCHANT FOR OVERREGULATION.

The CWA, known as the Federal Water Pollution Control Act at the time of its enactment in 1972, is a comprehensive effort by Congress to restore and maintain the "chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). However, as laudatory as these goals may be, the actual legal requirements are found in other sections of the statute.

The cornerstone of the regulatory scheme established by the CWA is Section 301, 33 U.S.C. § 1311, which prohibits the discharge of "any pollutant" into "navigable waters," except when in compliance with various sections of the CWA, including Section 404, 33 U.S.C. § 1344. Section 404 establishes a program whereby the Corps issues permits for the "discharge of dredged and fill material." The Section 404 program is somewhat of an orphaned hybrid that arose out of the combination of the historic regulation by the Corps of obstructions to navigation under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and the environmental concerns of the CWA.

A troublesome shortcoming of the Section 404 program is that it bears, at best, a strained relationship to the purposes of the CWA, as evidenced the civil enforcement action brought against Petitioner. The purpose of the CWA is to protect water quality, not to regulate land-use. As stated recently by Judge Vinson in a similar CWA enforcement action:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice In Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable *waters* of the U.S."

United States v. Ocie Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) (emphasis in original).

The substance of the CWA's jurisdictional boundaries has not been altered by Congress since 1977. Even when Congress considered the 1977 amendments to Section 404, it attempted to curb what many members of Congress perceived as "the Corps' penchant for overregulation, particularly in cases of *de minimus* environmental concern." *1902 Atlantic, Ltd. v. Hudson*, 574 F. Supp. 1381, 1397-98 (E.D. Va. 1983). The *1902 Atlantic, Ltd.* Court's quotation from a colloquy during the floor debate on the Senate bill, (S. 1952) between Senator Muskie (the Senate manager of the 1977 amendments) and Senator Bentsen, is illustrative of Congress' concern for the Corps' penchant for overregulation:

> MR. BENTSEN: Mr. President . . . Section 404 has become a symbol to many Americans of how a well-intended legislative initiative can turn into a quagmire of disruption, frustration, and bureaucratic entanglement for the ranchers, farmers, foresters, and average citizens of this country.
>
> * * *
>
> Section 404 has become synonymous with Federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism. . . .
>
> * * *
>
> During Senate consideration on the conference report on the Clean Water Act of 1977, Senator Muskie,

> who also was one of the Senate conferees, stated that the statements made during Senate debate, such as the statements above, adequately reflect the legislative intent with respect to Section 404.

1902 Atlantic, Ltd., 574 F. Supp. at 1398, n.16 (quoting Legislative History of the Clean Water Act of 1977, Vol. 3-4, pp. 470, 901-902 (1978)) (emphasis added).

Unfortunately, despite the concerns expressed in 1977, by Senators Bentsen and Muskie, things have become worse – not better. The "penchant for overregulation" (by both the Corps and EPA) now victimizes farmers and landowners nationwide, including *amici*'s membership, as the Corps and EPA attempt to use the CWA to expand their "regulatory turf" out of the water, out of the swamps and marshes, straight onto dry land.

Much like Judge Vinson's discomfort with the Corps' regulatory framework, in *United States v. Larkins*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1131 (1989), Circuit Judge Merritt went out of his way, *sua sponte*, to criticize the Corps' overexpansive jurisdictional approach:

> [T]he Corps has not expanded the definition of "navigable waters" to include any creek or stream or moist area. . . . "Under such a construction [as proposed by the Corps of Engineers] low lying backyards miles away from a navigable waterway would become wetlands." [citation omitted] The Corps' definition has apparently detached and untied the "wetlands" jurisdiction of the Corps from any concept of "open waters" or navigable waters. A farmer's low lying farmland or a homeowner's low lying backyard – adjacent to a small stream or creek many miles from any navigable waterway – has apparently been converted into government property no longer subject to control or improvement by the owner without government permission. A "wetlands" has apparently been read to include simply "moist land adjacent to a creek." The framers of the Constitution were solicitous of the rights of landowners – especially small farmers struggling for survival – not to have land appropriated by the government. They

> therefore adopted the provision of the Fifth Amendment of the Constitution prohibiting the taking of private property for public use without just compensation.

United States v. Larkins, 852 F.2d at 193 (Merritt, J., concurring).

Unlike the present case, *Larkins* involved land covered in part with "knee deep waters" and cypress trees, 659 F. Supp. 76, 79, containing numerous sloughs and depressions which defendants filled, 852 F.2d at 190, and which previously "tended to be covered by standing water." *Id.* at 191. Although this Court has held that a "taking" claim is no defense to a § 404 enforcement action, *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985), as indicated by Judge Merritt in *Larkins*, it is fundamentally wrong for the government to try to seize control of its citizens' property under the pretext of enforcing an "anti-water pollution" statute. *See* Exec. Order 12630, March 15, 1988, 53 *Fed. Reg.* 8859, "Governmental Actions and Interference With Constitutionally Protected Property Rights" (directing each agency to account for Fifth Amendment "taking" concerns in carrying out actions, including regulatory and permitting functions).

A. THE REGULATORY HYDRA: REGULATING DRY LAND WHEN THE CORPS' REGULATIONS PURPORT TO REGULATE ONLY TRULY AQUATIC AREAS.

The federal government's new trend (*i.e.*, regulating under § 404 as if it were a "land preservation statute," instead of an "anti-water pollution" statute), even conflicts with the Corps and EPA's own regulations. The regulations defining "wetlands" have remained unchanged since 1977. After defining "wetlands," the regulations further clarify the definition by stating that "[w]etlands generally include swamps, bogs, marshes, and similar areas." 33 C.F.R. § 328.3(b). As stated in the preamble to the 1977 regulations, this language was included to demonstrate the intent of the Corps to include "only truly aquatic areas." 42 *Fed. Reg.* 37,129 (1977).

Notably, the Corps' clarifying sentence of its "wetlands definition" does *not* state that wetlands generally include *corn fields*, *soybean fields*, and *vacant lots*. Thus, unless corn fields, soybean fields, and vacant lots are "similar areas" to "swamps, marshes, and bogs," 33 C.F.R § 328.3(b), regulatory jurisdiction cannot attach.

The rule of *ejusdem generis* demands that "where general words follow an enumeration of specific things, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison v. P.P.G.*, 446 U.S. 578, 588 (1980).

The general words "similar areas" follow the more specific words "swamps, marshes, bogs" in the definition of wetlands contained in 33 C.F.R. § 328.3. Consequently, for land to be considered a "wetland," it must be the same type of area as a swamp, marsh, or bog. The Corps and EPA, however, have recently attempted to discard this plain reading, and now interpret the phrase "similar areas" to mean "other areas" – including cultivated farm fields, dry lots, and other typically non-aquatic areas.

Why the new quest to regulate dry land? An environmental group's recent publication sheds light on the Corps' motive – bureaucratic self-preservation:

> For civil engineers in general, environmental projects offer a boundless future. For the Corps in particular they mean job security. The day of huge river basin projects has passed; with growing public resistance to such projects, and tightening budget constraints, the Corps could be relegated to custodian status. Environmental engineering offers the Corps steady work, an image pure and true – and an almost bottomless pork barrel.

Audubon Magazine, July, 1990, at 111. Thus, from the Corps' own self-interest arose a new Manual for making jurisdictional determinations over supposed "wetlands."

B. THE PENCHANT FOR OVERREGULATION SIGNIFICANTLY IMPACTS THOUSANDS OF SMALL, PRIVATE LANDOWNERS.

The national significance of this case, and the nationwide magnitude of the problem faced by landowners, is heightened by the Corps/EPA attempt to leave behind their aquatic jurisdictional boundaries and come onto dry land. A revealing and alarming portrait of these agencies' view of their expanding jurisdiction is found in an EPA publication that states: "If there's not a wetland in your neighborhood, there's probably one nearby." EPA: "America's Wetlands: Our Vital Link Between Land and Water," p. 1 (1988). Landowners across the nation have become outraged and adamantly disagree with the agencies' claims that their normally dry, solid-ground constitutes "navigable water" under the CWA, and that merely moving dirt (not "cellar dirt," 33 U.S.C. § 1362(6)) in a field, or on a dry lot, is considered a "discharge of a pollutant into water." Thus, Petitioner's question presents an important issue for this Court to decide, that is, whether, as a matter of statutory interpretation, § 1362(6) of the CWA, which defines "pollutants" as certain materials "discharged into water," can be construed to mean the discharge of clean fill in a temporarily ponded area that might be visited by migratory birds.

Significantly, many, if not most landowners (such as Petitioner) find themselves confronted with the agencies' jurisdictional claim only *after* they have already commenced work on what any reasonable person would view as a non-aquatic area. When the agencies assert jurisdiction and inform the landowner that he or she is a "violator" and a "water polluter" subject to the wide gambit of potential penalties and injunctive relief set forth in the CWA, *see* 33 U.S.C. § 1319, the landowner is placed in a precarious position. He can capitulate, face an "enforcement action," or attempt to obtain judicial declaratory relief for an action that no reasonable person would have considered to be illegal.[2] The agencies then typically

[2] However, the Courts of Appeals are consistently holding that the Corps and EPA's administrative "cease and desist" orders are "pre-enforcement review" and

capitalize on their superior bargaining position and the extreme imbalance of economic and other resources to extort "mitigation" by offering the "carrot" of a § 404 permit, all the while "wielding the club" of enforcement, which includes the threat of imprisonment, fines, costly litigation and/or "restoration" – alternatives and risks the agencies know the unfortunate landowner can ill afford.

II. BACKGROUND ON THE STRUCTURE OF THE CONSTITUTION.

Amici applaud this Court's renewed discussion of "first principles." *United States v. Lopez*, 115 S.Ct. 1624 (1995). For nearly two hundred years, this Court has held that "It is, emphatically, the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137 (1803). Indeed, "[t]his is the very essence of judicial duty." *Id.* at 178. Therefore, though not written into the Constitution, the power of judicial review is a bed-rock principle of American jurisprudence. In exercising this power, *Amici* respectfully suggests that the Court must be mindful that "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written." *Marbury* at 176.

A. SCOPE OF THE COMMERCE POWER.

The scope of Congress' power under the Commerce Clause is set forth in *Hodel v. Virginia Surface Mining & Reclamation Assoc.*: "This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." 452 U.S. 264,

therefore, not reviewable by the Courts. *See, Laguna Gatuna, Inc. v. Browner, et al*, ___F.3d ___ (10th Cir. 1995), Petition for Certiorari filed September ___, 1995); *Southern Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418 (6th Cir.), *cert. denied* ___ U.S. ___ 115 S.Ct. 316, 130; *Rueth v. United States EPA*, 13 F.3d 227 (7th Cir. 1993); *Southern Pines Association v. United States*, 912 F.2d 713 (4th Cir. 1990).

276-277 (1981). Perhaps the quick conclusion is that the foregoing defines an unlimited power, one that is unlimited both in its jurisdictional reach and in Congress' authority to set the limits of that reach. However, the constant refrain in most, if not all, of this Court's cases reviewing each new exercise of the Commerce power is that there are not only limits, but constitutionally required limits dictated by the federalist structure embodied in the Constitution. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

In light of this federalist structure, the Commerce power is not and cannot be unlimited because it is only one of several defined and enumerated powers. *U.S. v. Lopez*, 115 S.Ct. at 1628. When an exercise of that power threatens to "obliterate the distinction between what is national and what is local," it is the duty of this Court to articulate and apply constitutional limits upon that power.[3] Thus, while Congress' power is plenary, Congress does not possess the authority to reach beyond the boundaries the Constitution establishes. The power is plenary only within its own sphere. Further, the existence and vitality of this principle is not disputed, is consistently reiterated by this Court, and is implicit in the delegation of powers contained in Art. I, Sec. 8.

Indeed, if the framers intended to give Congress the power to operate in all spheres, it would not have been necessary to list the spheres of Congressional power in the Constitutional text. Moreover, to remove any doubts as to the intentions of the framers in this regard, the principle was included within the

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[3] [I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in commerce. Nor is it sufficient that the person or activity reached have some nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a substantial effect on interstate commerce. Moreover, simply because Congress may conclude that a particular activity *substantially* affects interstate commerce does not necessarily make it so. Congress' findings must be supported by a "rational basis" and are reviewable by the courts. *Hodel* at 310-311 (Rehnquist, J., concurring) (citations omitted) (emphasis added).

Bill of Rights and expressly added to the Constitution via the Tenth Amendment.[4]

B. CO-OPERATIVE FEDERALISM.

In deciding whether the limits of any enumerated power have been exceeded, the Court is directed to consider the Tenth Amendment and the principles of federalism embodied therein:

> The Tenth Amendment likewise restrains the power of Congress. . . . [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article power.

New York v. United States, 112 S.Ct. 2408 (1992) (emphasis added). The Court's role in deciding the proper use of the Commerce power, therefore, necessarily includes analyzing how a particular exercise of that enumerated power relates to the Tenth Amendment and the incidents of state sovereignty that the Tenth Amendment protects. Through such an analysis,

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[4] In *Lopez*, this Court rejected the same expansive view of the Commerce Clause that the "migratory bird" rule purports to be based upon:

> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is quite difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. *Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.*

United States v. Lopez, 115 S.Ct. 1624, 1632 (1995). (emphasis added).

the "proper" or "healthy" balance of federalism is preserved. In conducting that analysis,

> [I]t makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the states under the Tenth Amendment.

Id. at 2419.

The foregoing confirms that "the Tenth Amendment and the Commerce Clause issues . . . are but two sides of the same coin." *Lopez*, *supra*. Regarding the Tenth Amendment side of the coin, "state sovereignty is not just an end in itself," *New York*, 112 S.Ct. at 2431, but "[r]ather federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).[5]

Regrettably, the tone of the Ninth Circuit's opinions suggests that the distinctions drawn by the Petitioner's suit are small matters and mere quibbling in light of the undeniable juggernaut of Congressional power that has been unleashed under the Commerce Clause. The Ninth Circuit simply asserted, without discussion, that "[t]he commerce clause power . . . is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds." *Leslie Salt v. United States*, 896 F.2d 354, 360 (9th Cir. 1990). In its most recent decision, although conceding that "[t]he migratory bird rule certainly tests the limits of Congress' commerce powers and, some would argue, the bounds of reason," the court declined to reconsider its previous holding, which was deemed not "clearly erroneous," and therefore binding as the law of the case. The result is in conflict with this Court's recent decision in *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624 (1995).

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[5] The analysis is larger in its implications and more significant in its substance because the Tenth Amendment and its incidents of state sovereignty must be viewed in light of the "fundamental liberties" it protects. *See New York*, 112 S.Ct. at 2431.

This Court recognized that to uphold the government's arguments for the validity of the Act, "we would have to pile inference upon inference in a manner that would bid fair to a convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states." 115 S.Ct. at 1634.

As in *Lopez*, the prohibition has nothing directly to do with interstate commerce. The discharger may be a local landowner with no interstate connection and his actions may have no commercial purpose. By hypothesis, the "waters" involved are entirely intrastate, are isolated from any interstate waterbody, and serve no interstate function. They are regulated solely on the basis of their use by migratory birds. Yet, obviously enough, the self-propelled flight of birds across state lines is not itself interstate commerce. Accordingly, local activity that bears on such bird migration – even if adversely (not a showing required under migratory bird rule or attempted here) – is not within the reach of the Commerce Clause unless some true interstate commerce can be shown to be "substantially affected" by the challenged activity. *Lopez*, at 1632. As in *Lopez*, that finding cannot be made here without "pil[ing] inference upon inference." The migratory bird rule does not depend on the "commercial" character of the avian visitors.

However, "for want of a nail" large causes have been lost and it will not do, therefore, to dismiss considerations of small things as small things or mere quibbling when they relate to the structure of the Constitution itself. Accordingly, *Amici* respectfully requests that the Court grant the Petition for *certiorari* and strike the constitutional infirmity in this case.

III. THE NINTH CIRCUIT'S DECISION IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THIS COURT'S PREVIOUS DECISIONS REGARDING THE LIMITS OF FEDERAL POWER.

When writing the majority opinion in *Garcia v. San Antonio*, 469 U.S. 528 (1985), Justice Blackmun rejected the Tenth Amendment tests employed by previous courts for discerning what constitutes the essential elements of state sovereignty.

The error with each of these tests, Justice Blackmun noted, is that they inevitably invite an unelected federal judiciary to make decisions as to which state policies it favors or dislikes. Therefore, instead of looking at governmental functions, the Court focused on "principles of democratic self governance." *Garcia* at 546. (emphasis added).

Federalism principles, implicit in the Constitution, demand an initial inquiry into democratic principles of self-governance necessarily performed by state and local governments. Land use planning or control is an essential attribute necessary to the separate and independent democratic state governments because: (1) it encompasses the process of evaluating, establishing and zoning wholly intrastate non-commercial state and private activity, as well as commercial activity, in order to effectuate the desired nature of and the quality of life in local communities (which is not the private business activity differentiated in *New York*); (2) it cannot be viewed in a single dimension as an exercise of the police power, rather, land-use planning is a hybrid governmental service by which states and local communities define and effectuate the nature and quality of their existence as well as governmental fiscal structure; (3) federalism principles involve concepts of local self determination and accountability essential to the determination of and quality of the existence for local communities and their people; (4) land-use planning and control is, in fact, the manifestation of a physical quality of a state because it is a state's use of its lands, i.e., an assertion of a state's quasi-real property interest in the land within its borders; and (5) the presumed local benefit-burden resulting from land-use planning and control or the "average reciprocity of advantage" becomes nonexistent if exercised by the Federal Government under the Commerce Clause, thereby raising serious Fifth Amendment questions.

The "migratory bird rule", as erroneously justified by the Ninth Circuit, attempts to view and define federal land-use planning and control solely in terms of visiting interstate birds. The migratory bird rule does not require a "commercial" bird that may, after capture, become an object of "commerce between the States." Nor does it depend on interstate human travellers (whether hunters, scientist, or bird watchers). If it

were otherwise, there would be no need to restrict coverage to migrating birds that cross state or international boundaries. Unlike the statute in *Lopez*, neither the text nor the legislative history of the Clean Water Act remotely suggests that the migratory bird rule was contemplated. However, land-use planning and control necessarily involves evaluating, establishing and zoning intrastate non-commercial state and private activity,[6] as well as commercial activity, in order to effectuate policies (which transcend economics) for the overall nature of, and quality of life, in local communities.

The essence ("experience") of land use planning and control transcends being characterized solely in terms of a power source. States and their local communities, through the means of land use planning and control, define and effectuate that intangible but recognizable quality of life within a given community, including whether it will provide "open space" and limit population density, *Agins v. City of Tiburon*, 447 U.S. 255 (1980); whether it will encourage industrial development, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); and whether it will seek to preserve historic and natural advantages, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). These decisions are based upon such considerations as the location and availability of fire, water, and sewer services to a given area; potential depletion of local resources; availability of other suitable lands; meeting a community's growth demands; protecting the public health by appropriately zoning incompatible uses; providing recreational opportunities for its citizens, and providing a sufficient tax

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[6] No Commerce Clause case has involved even remotely similar far-reaching impacts on intrastate private and state non-commercial activity as presented by direct federal land-use planning and control using a "national significance" standard. Many cite *Wickard v. Filburn*, 317 U.S. 111 (1942), as allowing the Commerce Clause power to reach the personal consumption of wheat. Such a view is a gross distortion. A person growing wheat in their backyard only for personal consumption, no part of which is to be sold in commerce, was not subject to the Agricultural Adjustment Act. However, federal land-use planning under the agencies' "migratory bird rule" would prohibit wholly intrastate private and state non-commercial activity, even though a state or local community would benefit from other uses, i.e., the quality of life in and the nature of local communities.

base to support local governmental services. "Accountability is thus diminished when due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate. . . . " *New York, supra.*

Land-use planning and control is also integral to the local governmental financial structure and stability necessary to the delivery of certain essential governmental services. In fact, most of the school systems throughout the United States are financed directly by and their quality is dependent upon real and personal property tax revenues, *see, e.g. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 10 (1973). Local communities utilize land-use planning concepts interrelated with property taxes to encourage or discourage various uses of property and to enhance the financial stability of the governmental unit so as to be able to make and effectuate policy decisions in these governmental service areas.

Amici's numbers are extremely alarmed at the concept of designating areas as "waters of the U.S." solely because they are visited by migratory birds as a justification for federal land-use controls. *Amici* believe that the migratory bird rule is nothing more than a device designed to skirt the Constitution's provisions for a limited federal government and protection of individual liberties, all protections of little value if Congress is free to convert clearly defined private rights into vast public rights. Liberty is nothing if it is to be subjected to such utilitarian calculations, or to the dictatorship of unconstrained majoritarianism.

As recognized by this Court: "[z]oning laws and their provisions, long considered essential to effective urban planning are peculiarly within the province of the state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). These elements of self-determination and accountability have been emphasized by this Court since the early land use cases,[7] and are essential because of the very diverse

[7] For more than 200 years, regulation of land use has been exercised exclusively by the states. *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926);

culture, geography, geology and climate among the states that "have all but necessitated the recognition of legal distinctions corresponding to these difference," including principles of federalism. *California v. United States*, 438 U.S. 645, 648 (1978).

In fact, "[p]reservation of local control, naturally enough, involves protecting the integrity of state and local governments." *City of Rome v. United States*, 446 U.S. 156, 201 n.12 (1980) (Powell, J., dissenting). *Amici* submit that to remove the hybrid governmental service of land-use planning and control from those directly affected and concerned is to allow rule by those whose existence and destiny and, therefore, perspective, is totally removed from the consequences, without accountability to those affected. It would cut to the core of federalism.

IV. LAND IS NOT A COMMODITY READILY SUSCEPTIBLE TO UNIFORM NATIONWIDE PLANNING OR REGULATIONS.

Land-use control and planning is, in fact, a state's use of its lands based on a quasi-property interest. Accordingly, the state's relationship to its lands has been afforded special treatment by this Court. *See, Kansas v. Colorado*, 206 U.S. 46, 93 (1907). For example, land within a state's boundaries is subject to public or state use in the form of a servitude by which the state can restrict the owner's right to use the property for the benefit of the state and its citizens without a "taking" necessarily occurring, in part because of the presumed local benefit-burden resulting from land use planning and control. *See, Keystone Bituminous Coal Assoc. v. De Benedictis*, 480 U.S. 470 (1987).

Equally as important in the balancing of land use planning and control within the constitutional framework and principles of Federalism is the Fifth Amendment protection afforded property rights that cannot be "taken for public use, without

Berman v. Parker, 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

just compensation." Historically, Congress has expressly provided compensation mechanisms when it determines that private property must be taken for public use.[8] Because there is an average reciprocity of advantage, there may be situations when compensation is not required:

> Any limitation so severe [as a confiscatory regulation] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the *State's* law of property and nuisance already placed upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the *State's* law of private nuisance, or by the *State* under its complimentary power to abate nuisances that affect the public generally or otherwise.

Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992) (emphasis added).

This average reciprocity of advantage emphasizes the elements of self-determination and accountability within the concepts of Federalism. Allowing the federal government, under the Commerce Clause, to dictate land use control and planning concepts based on "substantial and adverse effects" upon commerce would either effectively remove or so dilute the local benefit to landowners and leave only the burden, as to impinge directly upon Fifth Amendment rights.[9]

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[8] For example, programs to acquire private lands to remain essentially in their natural state for the public benefit, be they wetlands, coastal areas, and other open spaces for parks, wildlife refuges, and the like. *See e.g.*, Emergency Wetlands Resources Act of 11986, 16 U.S.C. §§ 3921-3923; The Recreation Use of Conservation Areas Act of 1962, as amended, 16 U.S.C. § 460 K-1; The Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 4601; The National Wildlife Refuge System Administration Act, 16 U.S.C. § 688 dd(3); The Migratory Bird Conservation Act, as amended, 16 U.S.C. § 715; The Federal Land Policy and Management Act, 43 U.S.C. § 1748.

[9] *See, Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (the question "at bottom" in a takings case is "upon whom the loss of the changes

In today's society, one of the most essential attributes of sovereignty possessed by the states and their political subdivisions and one that is constitutionally protected is this hybrid governmental service of land-use planning and control through the states' use of their lands for the benefit of their citizens. That Congress has not previously sought to impose nationwide, uniform and mandatory land use requirements undoubtedly reflects a recognition of the uniqueness of each parcel of land. Land traditionally has been subject to the equity jurisdiction of the courts so as to provide flexibility and avoid the harsh results that might be obtained if considered under rigid rules of law. *IV Pomeroy's Equity Jurisprudence*, § 1402 p. 1034; 2 Story, *Equity Jurisprudence*, §§ 829-843, 993.

While the legislative scheme set up in the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," CWA § 101, 33 U.S.C. § 1251, was intended to expand federal regulation beyond the reach of traditionally navigable waters, Congress did not automatically include every waterbody, however isolated, within the coverage of the Act. As this Court noted in *United States v. Riverside Bayview Homes*:

> In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," [citations omitted], the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control

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desired should fall.") *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (takings clause is " 'designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole.' " (quoting *Armstrong v. United States*, 364 U.S. 40, 40 (1960)); *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987) (the government cannot "single [ ] out 'individuals' to bear the burden of [its] attempt to remedy" public problems).

> statutes and to exercise its powers under the Commerce Clause to regulate *at least some waters that would not be deemed "navigable" under the classical understanding of that term.* See S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

474 U.S. at 133 (emphasis added).

Thus, this Court's *Riverside Bayview* decision does not remotely suggest that the CWA embraces non-navigable waterbodies that are not connected to any navigable water system, much less isolated wetlands, wetlands above the headwaters, or temporarily ponded rainwater. This Court pointedly did not endorse the Government's suggestion that the 1977 reconsideration of the statute should be taken as proof that § 404, as enacted in 1972, was intended to authorize the full sweep of the Corps' regulations, including the provision that reaches "isolated" waters and wetlands.

CONCLUSION

For the foregoing reasons, a *writ* of *certiorari* should be issued to review the decision of the Ninth Circuit Court of Appeals. The insidious assault that decision permits against our constitutionally protected federal form of government must be turned back.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CARGILL, INCORPORATED,
a Delaware Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE NATIONAL ASSOCIATION OF REALTORS®, AND THE NATIONAL REALTY COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The National Association of Home Builders, the National Association of Realtors®, and the National Realty Committee respectfully file this brief as *amici curiae* in support of Petitioners. Written consent has been obtained from counsel for Petitioners and Respondents for the filing of this brief pursuant to Supreme Court Rule 37. The consent letters have been filed with the clerk's office.

INTEREST OF *AMICI CURIAE*

The National Association of Home Builders ("NAHB") represents 185,000 builders and associate members (*e.g.*, land planners, land developers, industrial developers) organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. The National Association of Realtors® ("NAR") is a not-for-profit professional association comprised of approximately 712,000 persons engaged in all phases of the real estate business. Its members include real estate brokers, managers, appraisers, counselors, and a variety of other participants in the real estate market. The National Realty Committee ("NRC") serves as a roundtable in Washington, D.C. on national policy issues affecting real estate owners, advisors, builders, investors, lenders, and managers.

NAHB, NAR, and NRC members are involved in the development of myriad projects throughout the country and, as a result, have substantial collective experience with federal regulation of waters of the United States. Accordingly, NAHB, NAR, and NRC believe they can assist the Court in obtaining an additional perspective on the issue presented in the underlying case. Because the policy challenged in this case restricts the development potential of vast areas of land—and therefore the value of that land—this Court's resolution of the issue presented would be of great significance to NAHB, NAR, and NRC's members and other similarly situated developers and landowners.

SUMMARY OF ARGUMENT

This case concerns the validity of a federal agency theory of jurisdiction that has injected the awesome power of the federal government into the humble realm of local land use planning. Section 404 of the Clean Water Act ("Act") empowers the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") to regulate the discharge of dredged and fill material into waters, including wetlands, the use, degradation or destruction of which could affect commerce. Under the Corps' and EPA's "migratory bird test," a wetland or "other water" is deemed to have a sufficient effect on commerce to trigger federal jurisdiction if the wetland or water could be used by migratory birds that cross state lines. Because the Corps defines wetlands and waters broadly—an area can be dry at the surface year in and year out and still qualify as a "wetland"—and because all places on earth are susceptible to bird use (actual use is not required), the bird test brings into federal jurisdiction many shallow depressional areas that would otherwise be managed without federal involvement.

The question before this Court is whether the validity of the migratory bird test is a matter of sufficient importance to merit the Court's attention. Some figures may help put the issue in perspective. Earlier this year, the Corps did a study to determine the number and acreage of isolated wetlands that are less than one-half acre in size. These small, remote areas are unlikely to possess other characteristics that might establish a Commerce Clause nexus (*e.g.*, they are not likely to be frequented by out-of-state visitors). Thus, they will or will not be subject to federal authority depending on whether the bird test is sustained.

The study found that there are about 8,309,502 discrete isolated "wetlands," averaging one-quarter acre in size, scattered across 1,836,469 acres of the American landscape. This acreage is just one-tenth of one percent of the two-billion-acre surface area of the continental

United States, but the absolute number suggests that a multitude of citizens and local governments are affected by the migratory bird test. With the test, eight-million-plus tiny low spots will be subject to federal regulation because they "could" be used by birds. Without the test, the federal government would still regulate the vast majority of wetlands (approximately 104 million acres) and other waters (about 34 million acres), but it would not reach these eight million spots. They would be regulated, or not, by the numerous states and more than 5,000 local governments that already have laws in place to protect wetlands.

The migratory bird test is therefore of critical importance to any person who wants to use or develop property that includes a tiny depressional area. It is also important to state and local officials who are attempting to develop coherent land use plans because it gives the federal government eight million quarter-acre chances to override land use decisions that traditionally have been the province of the states.

The bird test is wrong for two principal reasons: first, because Congress did not intend to reach these tiny, remote areas when it passed the Clean Water Act, and second, because the Commerce Clause does not empower the federal government to assert authority over discrete isolated areas based solely on potential bird use.

As to congressional intent, neither the statute nor the legislative history mention isolated areas such as are at issue here. Nor is there any suggestion that Congress intended to displace traditional state authority in the land use area. In other cases where the Court has confronted broad federal claims that would upset the traditional federal-state balance, the Court, to preserve our federalist system, has declined to infer broad congressional intent and instead has required a "clear statement" that Congress understood the federalism implications of its actions and intended them to occur. Here, there is no such clear statement. Instead, there is ample evidence that Congress

respected and wanted to preserve existing state authority over resources within state borders.

In addition, the Commerce Clause does not authorize Congress to regulate isolated waters based solely on the potential presence of migratory birds. Migratory birds themselves have no effect on interstate commerce, let alone the substantial effect required by *United States v. Lopez*, 115 S. Ct. 1624 (1995).

While it may theoretically be possible to establish, on a case-by-case basis, a legitimate link between a particular isolated water's use, degradation or destruction and interstate commerce, the migratory bird test does not do it. The test is analytically unsound because the premise leapfrogs the conclusion. Under the government's approach, the potential presence of birds establishes, *ipso facto*, that any use of the water will affect commerce. No effort is made to show how bird use results in an effect on commerce; it is just assumed. The migratory bird test is also defective because it utterly disregards the traditional land use planning authority of state and local governments. Finally, the issue has divided the courts of appeals, with the result that federal jurisdiction is determined differently depending on where property is located.

ARGUMENT

I. THIS CASE WARRANTS SUPREME COURT REVIEW BECAUSE IT RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT AFFECTS THE USE OF MILLIONS OF ACRES AND HAS BEEN RESOLVED DIFFERENTLY BY THE COURTS OF APPEALS.

This case involves the issue left unresolved in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 n.8 (1985): whether the Corps has authority under Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1994), to regulate isolated waters that are not adjacent to and have no connection to navigable waters. In the case below, the Ninth Circuit held that a previous panel

of the court was not "clearly wrong" in holding that the Corps' regulatory jurisdiction under the Act extends to isolated waters simply because such areas "may" be used by migratory birds. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394-96 (1995).

Without any minimum requirements as to size, type or frequency of use, or type of bird, the consequence of the Ninth Circuit's decision is to sweep countless isolated areas into federal jurisdiction without regard to the areas' value in promoting water quality, their real effect on interstate commerce, or even their significance to migratory birds. The decision allows the government to convert a homeowner's backyard or a high school's baseball diamond into a federal fief that is "no longer subject to control or improvement by the owner without [federal] government permission." *United States v. Larkins*, 852 F.2d 189, 194 (6th Cir. 1988) (Merritt, J., concurring). Because the migratory bird test trenches in ill-considered fashion on our Nation's federalist system and affects millions of landowners in the process, the question as to its validity is of significant national importance. Accordingly, the question should be decided by the Supreme Court.

* * *

Under Section 404, a person must obtain a permit from the Corps in order to discharge dredged or fill material into "navigable waters." 33 U.S.C. § 1344. The term "navigable waters" is defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The Corps and EPA, who administer the program jointly, have issued regulations that define "waters of the United States" as including "all *other waters* . . . [including wetlands] the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3 (a)(3) (1994) (emphasis added); 40 C.F.R. § 230.3 (s)(3) (1994) (same). The regulations state that the requisite effect on commerce may be established if an area is used by interstate travelers for recreational or other purposes; or if fish or shellfish could be taken from

the area and sold in interstate or foreign commerce; or if the area is used or could be used for industrial purposes by industries in interstate commerce. *Id.* In the preamble to its 1986 regulations, the Corps suggested that the required Commerce Clause nexus could also be established by a showing that the waters "are or would be used as habitat by . . . migratory birds which cross state lines." 51 Fed. Reg. 41,206, 41,217 (1986). This explanatory language has come to be known as the "migratory bird test."

A. This Case Warrants Supreme Court Review Because the Migratory Bird Test Affects Millions of People and Interferes with Traditional State and Local Control over Land Use Decisions.

In determining whether to assert jurisdiction over a parcel of land, the Corps determines, first, whether the area meets the technical criteria to qualify as a "wetland" or as any other type of "other water," and second, whether use of the "wetland" or "other water" has the kind of effect on interstate commerce that would transform the area into a jurisdictional "water of the United States." *See* 33 C.F.R. § 328.3(a)(3).

One of the two principal categories of "other waters" is open bodies of water such as rivers, lakes, and ponds. The Corps has expanded this category to include areas that—unlike lakes and rivers—rarely contain water. *See, e.g., United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (dry arroyos). The other principal category of "other waters" is "wetlands." *See* 33 C.F.R. § 328.3(a)(3), (b). Under the Corps' wetlands delineation guidelines, an area can be completely dry at the surface 365 days a year, year in and year out, and still qualify as a wetland. *See* Environmental Laboratory, Dep't of the Army, Technical Rep. Y-87-1, *Corps of Engineers Wetlands Delineation Manual* 34-41 (Jan. 1987). Artificial areas, such as farm ponds, are not excluded, nor is there a minimum size requirement for areas to warrant federal oversight. Indeed, a recent study found

that fifteen percent of Section 404 individual wetland applications processed by the Corps in 1992 had wetlands impacts that were less than one-tenth of an acre. Half of the wetland applications involved impacts that were 1.1 acre or less.[1]

A study conducted by the Corps in 1995 documents the importance of the migratory bird test in establishing federal jurisdiction over tiny, remote areas. The study was undertaken to determine the number and acreage of isolated wetlands in the United States that are less than one-half acre in size. As a general matter, these areas tend to be too small to support the indicia of interstate commerce contained in the agencies' formal regulations: they are not likely to attract interstate travelers for recreational purposes, to provide fish or shellfish for sale in interstate commerce, or to be used for industrial purposes by industries in interstate commerce. *See* 33 C.F.R. § 328.3(a)(3)(i)-(iii); 40 C.F.R. § 230.3(s)(3)(i)-(iii). Thus, the only way the federal government can reach these areas is through the bird test.

The Corps' study did not include data from seven states within the continental United States (Louisiana, Michigan, New Jersey, Ohio, Texas, Washington, and West Virginia). In addition, it did not include any isolated wetlands that are one-half acre or larger, nor did it include "other waters" that are not wetlands, such as the seasonal ponds on the Leslie Salt property. Even with these omissions, the Corps' census reports that there are 8,309,502 discrete isolated depressional areas that meet the federal wetlands definition scattered across 1,836,469 acres of the American landscape. U.S. Army Corps of Eng'rs, *1995 Wetlands Delineation Field Evaluation Forms* (June 1995) [hereinafter *1995 Corps Data Forms*]. The average size of these low spots is one-quarter acre. Although the total acreage covered by these tiny areas is less than one-tenth of one percent of the surface area of the continental

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[1] Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* 20, 22 (Feb. 1994).

United States (about two billion acres), *see* Thomas E. Dahl, U.S. Fish & Wildlife Serv., *Wetlands Losses in the United States 1780's to 1980's* tbl. 1 (1990), the high absolute numbers (more than eight million separate spots) suggest that many, many citizens are affected by the bird test. But from the federal perspective, it is not that significant: without the test, the federal government would continue to regulate the vast majority of wetlands (approximately 104 million acres) and other waters (about 34 million acres), *see id.*, but it would no longer reach these minuscule low spots in the middle of cornfields.

Every one of the eight million areas identified in the Corps' study, and innumerable "other waters" as well, is susceptible to migratory bird use.[2] Birds travel throughout the Western Hemisphere and may potentially use any land or water in the United States. In one study, for example, birds marked in North Dakota were recovered in forty-six states, ten Canadian provinces and territories, and twenty-three other countries.[3] In addition, actual "use" by birds is not even required; potential use is sufficient. Nor is there a minimum standard for kind or frequency of use. A single landing will suffice, as will any kind of migratory bird: nonwater-dependent species such as robins and wrens are treated identically to waterfowl.

Given these facts, the consequences of the Ninth Circuit's decision are profound. It is hornbook law that the regulation of land is a traditional prerogative of state and local government. *See FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("regulation of land use is perhaps the quintessential state activity"). Because areas that meet the federal definitions of isolated waters and wetlands are scattered throughout the landscape, state and local land

[2] *See, e.g., Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 262 (7th Cir. 1993) (noting that "migratory birds can alight most anywhere" and citing testimony to that effect by a biologist with the U.S. Fish and Wildlife Service).

[3] *See* U.S. Fish & Wildlife Serv., *Wetlands of the United States: Current Status and Recent Trends* 1 (1984).

use controls necessarily regulate the use of those areas. *See, e.g., Saturley v. Town of Hollis*, 533 A.2d 29, 31-32 (N.H. 1987); *cf. Lovequist v. Conservation Comm'n of Dennis*, 393 N.E.2d 858, 862-65 (Mass. 1979).

But by using the migratory bird theory to claim jurisdiction over intrastate property, the federal government has displaced traditional state authority over land use. Eight million low spots are now controlled by the federal government because they "could be used" by birds. Without the test, these areas would be regulated, or not, by the states. In fact, many states, and over 5,000 local governments, have laws in place to protect wetlands.[4] But state and local governments are powerless to implement their own land use regulations unless and until the federal government "signs off" on them. This insidious requirement

[4] For a sampling of state statutes that regulate isolated waters and wetlands, see Conn. Gen. Stat. §§ 22a-36 to -45 (1994); Fla. Stat. Ann. §§ 373.414-.421 (West 1995); Me. Rev. Stat. Ann. tit. 38, §§ 480-A to -U (West 1994); Md. Code Ann., Nat. Res. §§ 8-1201 to -1209.1 (1994); Mass. Gen. Laws Ann. ch. 131, §§ 40, 40A (West 1994); Mich. Comp. Laws § 281.701-.722 (1994); Minn. Stat. § 103G.222-.2242 (1994); N.H. Rev. Stat. Ann. § 482-A:1-:27 (1994); N.J. Rev. Stat. § 13:9B-1 to -30 (1994); N.Y. Envtl. Conserv. Law §§ 24-0101 to -1301 (Consol. 1994); Pa. Stat. Ann. tit. 25, § 105.17 (1993); R.I. Gen. Laws §§ 2-1-18 to -24 (1994); Vt. Stat. Ann. tit. 10, § 1272 (1994). Many of these statutes provide for local regulation or management of isolated waters and wetlands. *See, e.g.*, Conn. Gen. Stat. § 22a-42; Fla. Stat. Ann. § 373.421; Me. Rev. Stat. Ann. tit. 38, § 480-F; Md. Code Ann., Nat. Res. § 8-1204; Mich. Comp. Laws § 281.708; Minn. Stat. § 103G.2242; N.Y. Envtl. Conserv. Law § 24-0501; R.I. Gen. Laws § 2-1-21. For a sampling of local government ordinances or by-laws regulating isolated waters and wetlands, see Sacramento, Cal. General Plan CO-96 (1993); Broward County, Fla., Code §§ 27-331 to -350 (1993); *Lovequist v. Conservation Comm'n of Dennis*, 393 N.E.2d 858 (Mass. 1979); *Biggs v. Town of Sandwich*, 470 A.2d 928 (N.H. 1984); *see also Hearings on S. 1304 Before the Subcomm. on Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture), *available in* LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

alters the traditional balance between governments, to no good purpose.

As an illustration of the unprecedented reach of the federal program, consider that the State of Georgia currently has within its borders about 240,000 isolated wetlands that are each less than one-half acre in size. *See 1995 Corps Data Forms.* This means that the federal government has, *by virtue of the bird test alone*, 240,000 opportunities to insert itself into purely local land use decisions on such pedestrian concerns as the siting of grocery stores, elementary schools, and subdivisions.[5]

Furthermore, the Section 404 permitting process requires a significant commitment of resources. In 1992, for example, approximately 100,000 parties either applied for individual Section 404 permits or sought to qualify for general permits. For those who pursued an individual wetland permit, it took an average of 373 days to traverse the process. Moreover, for every year since 1989, the majority of permit applications have ended up being "withdrawn," which in most cases has meant that the project cannot proceed.[6] With results like these, it is no wonder that the 185,000 members of the NAHB have placed wetlands regulation among their top five "critical" concerns for eighteen of nineteen consecutive quarterly reporting periods over the last five years.

In short, the bird test burdens landowners, intrudes on state officials, and adds little environmental value. It is therefore as superfluous as it is imperious.

B. Supreme Court Guidance Is Required To Resolve This Important Issue That Has Divided the Courts of Appeals.

The migratory bird test has divided the three courts of appeals—the Fourth, Seventh, and Ninth Circuits—that

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[5] The same is true in all the states—*e.g.*, New Hampshire has 60,482 such areas; Oregon, 196,389; South Carolina, 153,147. *See 1995 Corps Data Forms.*

[6] Albrecht & Goode, *supra* note 1, at 15, 24.

have reviewed the issue. This division is an independent basis for Supreme Court review of the test.

The Seventh Circuit first held that Congress did not intend to reach isolated wetlands and that the assertion of jurisdiction over such areas went beyond Congress' Commerce Clause power. *Hoffman Homes, Inc. v. Administrator*, 961 F.2d 1310, 1316 (7th Cir.), *vacated*, 975 F.2d 1554 (7th Cir. 1992), *administrative order for penalties vacated*, 999 F.2d 256 (7th Cir. 1993). Upon rehearing, two of the judges on the panel declined to address the constitutional and statutory issues and instead held that the "regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial" and that "the regulation . . . allow[s] migratory birds to be that connection." *Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 261 (7th Cir. 1993). The third judge concurred in the outcome but on the basis of the statutory and constitutional infirmities laid out in the original opinion. *Id.* at 262-63 (Manion, J., concurring). The Ninth Circuit, by contrast, held that the Corps does have power to assert jurisdiction over isolated waters because migratory birds use or could use those areas.[7] *Leslie Salt*, 55 F.3d at 1394-95.

The Fourth Circuit, however, did not reach the merits of the issue, holding instead that the migratory bird policy is a "substantive rule" that is invalid because it was not promulgated in accordance with the notice-and-comment provisions of the Administrative Procedure Act. *See Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

As a consequence of the *Tabb Lakes* decision, the Corps and EPA no longer apply the migratory bird test in the states of the Fourth Circuit, but they continue to

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[7] In so holding, the Ninth Circuit misconstrued the Seventh Circuit's holding in *Hoffman Homes* as a decision on the Commerce Clause issue, when in fact it was a much narrower decision on the regulation. *Compare Leslie Salt*, 55 F.3d at 1393-95 *with Hoffman Homes*, 999 F.2d at 261.

apply the test outside those states. This differing application of the reach of Section 404 lacks any legal or equitable basis and warrants resolution by the Supreme Court.

II. CONGRESS DID NOT INTEND TO CLAIM JURISDICTION OVER ISOLATED WETLANDS AND WATERS BASED SOLELY ON POTENTIAL BIRD USE.

A. Congress Intended To Expand Federal Authority but Never Contemplated Federal Regulation of Isolated Waters.

There is no question that Congress intended the Act to reach further than had earlier federal water pollution control statutes. As the government is fond of noting, the Conference Report accompanying the 1972 legislation stated that "the conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Because pollution that enters the system at point *A* can travel across state lines through interconnected waterways to point *B*, Congress decided "to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (emphasis added) (upholding the government's authority to regulate adjacent wetlands). The key jurisdictional fact was the waters' interconnection, not their navigability.

But neither the statutory language nor the legislative history suggest that Congress wanted to regulate all, or even some, isolated waters. The 1972 debate was carried on in terms of lakes, rivers, and oceans; in 1977 some concern was expressed about adjacent wetlands because they help cleanse adjacent waterways. *See, e.g., Hearings on H.R. 3199 Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 377-78 (1977). But there was not a mention of isolated waters.

The Corps and EPA have agreed that the Act does not reach all wetlands and waters. The government has argued in litigation that "Congress did not automatically include every waterbody, however isolated, within the coverage of the Act." Memorandum in Support of Federal Defendants' Motion to Dismiss or in the Alternative for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 50, *National Wildlife Fed'n v. Laubscher*, 662 F. Supp. 548 (S.D. Tex. 1987) (No. G-86-37) [hereinafter Laubscher Brief]. Therefore, "small, isolated wet areas may not be waters of the United States . . . because . . . their destruction or degradation would not have an effect on interstate commerce." 45 Fed. Reg. 33,290, 33,398 (1980). Indeed, the Corps has recognized that a regulatory program that reached every isolated waterbody would be "unreasonable over-regulation." Laubscher Brief at 58.

The government still *says* that it does not regulate all waters, but rather only waters the use or degradation of which would affect commerce. 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3). But with migratory birds as a stand-in for the commerce nexus (an approach we believe violates the Commerce Clause), there are no waters whose use does not affect commerce. In short, the bird test subverts Congress' intent, which was to reach "at least some" waters that are not navigable, *Riverside Bayview*, 474 U.S. at 133, but not all of them.

B. Absent a "Clear Statement" from Congress, the Court Should Not Construe the Act To Alter the Federal-State Balance in Land Use Regulation.

As discussed above, the migratory bird test effects a massive intrusion of federal power into land use decisions that by tradition are the province of the states. Accordingly, to preserve the integrity of our federal system, the Court should not construe the statute to allow this intrusion unless it is absolutely clear that that is what Congress intended. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-43 (1985). In this case, it is not.

Indeed, Congress was at pains to preserve the authority of state government. Section 101 of the Act states specifically:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

33 U.S.C. § 1251(b) (1994). In furtherance of this policy, Congress declined to extend regulation to many known sources of water pollution—*e.g.*, runoff from agricultural and silvicultural operations and nonpoint source pollution associated with construction and mining activities. Similarly, Congress excluded groundwater from the Act's regulatory program because including it would have involved the federal government in complex state jurisdictional rules. S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971); 118 Cong. Rec. 10,699 (1972). But to complement the mandatory regulatory programs that would be administered by federal agencies under Sections 402 and 404 of the Act, Congress enacted Section 208 to encourage the states to develop area-wide management plans that would address the pollution sources not regulated by federal law. Thus, Congress struck a careful balance, exerting federal regulatory authority where necessary to protect the federal interest in the health of the "navigable waters," encouraging a voluntary federal-state partnership in areas beyond the reach of federal authority, and preserving state authority in all other spheres.

The migratory bird test eviscerates this careful balance, extending federal authority to at least eight million tiny, discrete "waterbodies," most of which would otherwise be controlled exclusively by state or local decisionmakers. Under our federal system, the Court will not allow this result unless it is clear that Congress considered and intended, when it passed the Act, to alter the traditional balance between the federal and state governments. This "clear statement rule" applies "in cases implicating Con-

gress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." *United States v. Lopez*, 115 S. Ct. 1624, 1655 (1995) (Souter, J., dissenting).

As the Court explained in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), "our Constitution establishes a system of dual sovereignty between the States and the Federal Government . . . [in which] 'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.'" *Id.* at 457 (quoting *Texas v. White*, 68 U.S. (7 Wall.) 700, 725 (1868)). The premise of the system is that with two governments vying for authority, the risk of tyranny or abuse from either is reduced. But "[t]hese twin powers will act as mutual restraints only if both are credible," *id.* at 459, and only if the citizen knows which government should be held accountable if a given function is not performed properly. *Lopez*, 115 S. Ct. at 1638 (Kennedy, J., concurring).

Of course, as long as Congress is acting pursuant to one of its enumerated powers, such as its power under the Commerce Clause, the Supremacy Clause allows Congress to trump state law, even in areas such as land use that by tradition fall within the state sphere. But under the "clear statement" principle, the Court will not simply assume that Congress has used its power to override state authority. Rather, "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971).[5] Mere ambiguity will not suffice. *Gregory*, 501 U.S. at 464.

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[5] The federalism principles that constrain Congress when it acts pursuant to its Commerce Clause authority are not as powerful when Congress legislates to enforce the Civil War Amendments. This is so because the very purpose of the Civil War Amendments was to intrude on state sovereignty. *Gregory*, 501 U.S. at 468; *EEOC v. Wyoming*, 460 U.S. 226, 243 & n.18 (1983).

Here, there is no evidence that Congress intended to alter the federal-state balance with respect to isolated waters and plenty of evidence that it did not. Accordingly, the migratory bird test cannot survive the clear statement rule.

III. THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESS TO REGULATE ISOLATED DEPRESSIONAL AREAS BASED SOLELY ON THE PRESENCE OF MIGRATORY BIRDS.

Although congressional power under the Commerce Clause is sweeping, it is not limitless. *Lopez*, 115 S. Ct. at 1632. This Court exercises great restraint when reviewing congressional judgments regarding what affects interstate commerce,[9] but ultimately it is the responsibility of the Court to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The idea that the law authorizes the federal government to "regulate puddles merely because a bird traveling interstate might decide to stop for drink" [10] is untenable and should not be sustained.

This Court has identified three factors to balance in determining whether Congress may regulate an intrastate activity under the Commerce Clause: (1) whether the intrastate activity is economic; (2) whether the statute in question sets forth a case-by-case "jurisdictional element" ensuring that a substantial connection to interstate commerce will be demonstrated each time federal law is applied to the intrastate activity; and (3) whether and to what extent the federal regulation encroaches upon an area of law traditionally left to the states. *See Lopez*, 115 S. Ct. at 1630-32. Taking these factors into account, the migratory bird test cannot sustain the federal regulation of isolated wetlands or waters.

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[9] Of course, such restraint is unnecessary when, as here, the constitutional judgment has been made by an administrative agency, not Congress.

[10] *Hoffman Homes v. Administrator*, 999 F.2d 256, 263 (7th Cir. 1993) (Manion, J., concurring).

A. The Activity Regulated by the Statute, *i.e.*, the Discharge of Dredged or Fill Material into Navigable Waters, Is Not Necessarily an Economic Activity.

If the intrastate activity subject to regulation is an economic activity, then it is more likely than a noneconomic activity to affect interstate commerce. *See id.* at 1630. Here, the activity being regulated is the "discharge of dredged or fill material," which may or may not be "economic." The Corps authorizes approximately 100,000 activities a year,[11] ranging from the planting of rose gardens to the development of shopping centers. Many permit applicants are individuals and families constructing or making improvements to their own homes. *See* 60 Fed. Reg. 38,650 (1995). These domestic undertakings are not "economic," nor are they the kinds of matters that typically trigger regulation by the federal government. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (intrastate coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (extortionate credit transactions); *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat sales).

The government's recent redefinition of the term "discharge of dredged material" has subjected even more noneconomic activities to federal authority. For example, the agencies have noted that walking, bicycling, or driving a vehicle through a wetland will cause a "discharge of dredged material." 58 Fed. Reg. 45,008, 45,020 (1993).[12] Surely, riding a mountain bike, even through a wetland, is not an "economic" activity.

In sum, the most that can be said about the economic character of the discharge of dredged or fill material is that it is problematic. Certainly, it is not *always* economic. This means that in any given case the government risks

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[11] *See, e.g.*, U.S. Army Corps of Eng'rs, Regulatory Branch, *Section 404 of the Clean Water Act and Wetlands Special Statistical Report* 5-6 (July 1995).

[12] Magnanimously, the government has declined to regulate these activities for now. *See* 58 Fed. Reg. at 45,020.

regulating something that is utterly unrelated to interstate commerce. Therefore, the question becomes whether the potential defect in the regulation is cured by a "jurisdictional element." We turn to that issue below.

B. The Migratory Bird Test Subverts the Requirement That the Interstate Commerce Connection Be Determined Case-by-Case.

A federal statute regulating noneconomic, intrastate activities may nonetheless satisfy the Commerce Clause if it contains a "jurisdictional element" ensuring that the requisite connection to interstate commerce will be established on a case-by-case basis. In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990 violated the Commerce Clause because the statute regulated a noneconomic activity (the possession of firearms) and because the statute "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *See Lopez*, 115 S. Ct. at 1631.

Here, of course, the regulations on their face appear to contain the jurisdictional element required by *Lopez*. Federal power extends to wetlands and waters *only* if their use "could affect interstate or foreign commerce." *See* 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3). The migratory bird test subverts the case-by-case requirement, however. Under the test, the presence of birds establishes, *ipso facto*, that the destruction of the wetland will substantially affect commerce. This is a *non sequitur*.

What is more, although the government *says* that some wetlands are subject to federal control and others are not, its test does not distinguish the federal from the nonfederal. Every place on earth is subject to potential bird use. No place is ruled out because the bird test does not require any particular kind of bird, or bird use, or any particular number of birds. A single bird, or even a potential bird, will suffice. So no place fails the test and no place that meets the federal definition of a wetland or a

water is not regulated. A "test" that distinguishes jurisdictional areas from nonjurisdictional areas based on potential bird use is no test at all.

C. The Migratory Bird Test Intrudes, Without an Economic Justification, on an Area Traditionally Left to the States.

If federal regulation premised on tenuous connections to commerce extends, unchecked, into areas traditionally sovereign to the states, the Commerce Clause will be transformed into a general police power that could be used to regulate every aspect of human existence. *Lopez*, 115 S. Ct. at 1634. Federalism principles require that the Court intervene to prevent this result. *See id.* at 1639 (Kennedy, J., concurring).

Once again, there are no "bright and clear lines." *Id.* (Kennedy, J., concurring). The extent to which the area of regulation is the province of the states must be considered, as well as the extent to which the regulated activity is connected to commercial concerns. For example, in *Lopez*, the firearm possession statute infringed the states' authority to regulate both education and criminal law. By passing a statute regulating the possession of guns in schoolyards, Congress had foreclosed the states from experimenting with "other, more practicable means to rid the schools of guns," even though both criminal law and education are areas "to which States lay claim by right of history and expertise." *Id.* at 1641 (Kennedy, J., concurring). As Justice Kennedy observed, simple possession of a firearm does not constitute commerce "in any ordinary and usual sense of that term." *Id.* (Kennedy, J., concurring). Because the intrusion on state sovereignty was significant, and the purported commercial nexus was not, the statute was found to have overstepped the bounds of the Commerce Clause. *Id.* at 1633.

Like criminal law and education, land use regulation is indisputably a state activity. *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). The migratory bird test

brings eight million depressional areas, averaging one-quarter acre in size, into federal jurisdiction. For every one of these eight million areas, state and local governments must subordinate their own land use decisions to the federal government's Section 404 program. In addition, because the migratory bird test brings virtually *all* isolated wetlands and waters into federal jurisdiction, states are hindered in their ability to experiment with different types of wetland protection programs. This intrusion into state land use regulation, in the absence of a substantial link to interstate commerce, cannot be justified under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in this case.

Respectfully submitted,

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No. 95-73

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

CARGILL, INCORPORATED,
a Delaware Corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR CARGILL, INCORPORATED

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Following its invariable custom, the Government has restated the case at length. Rather than quibbling over this somewhat selective exercise, we stand on the wholly accurate recitation in the opinion below, which we adopted in the Petition. ***But see*** Pet. at 6 n.4.

We note that the Solicitor General, on this occasion, does not attempt to minimize the practical importance of the first three questions presented.[1] Nor could he, given the tens of millions of acres and the millions of landowners directly affected. *See* Pet. at 11-12 n.9; A.C. Brief of the American Forest & Paper Association, Inc. at 7-10; A.C. Brief of the

[1] We answer the suggestion that the mandatory penalty question is of limited importance in a moment. *See* p. , *infra.*

National Association of Home Builders, et al. at 7-8; A.C. Brief of Pacific Legal Foundation at 14; A.C. Brief of Mountain States Legal Foundation, et al. at 8. So, also, the Solicitor General now rightly abandons the claim that these issues—rehearsed more than once at three judicial levels over a decade—are prematurely presented to this Court.[2] And, finally, although the concession is less than full, the Solicitor General effectively recognizes that an inter-circuit conflict exists with respect to two of the questions presented. The merits aside, there is, accordingly, a strong case for certiorari.

The Government has, however, addressed each of the questions presented on the merits and a brief reply is appropriate.

1. **The statutory question.** The Solicitor General first renumbers and rewrites our second "Question Presented" in what, at first blush, seems a harmless, if needless, exercise in self-indulgence. *Compare* Pet. at i, Question 2, with Br. in Opp. at i, Question 1. But, as it turns out, the rewriting is not innocuous. The Brief in Opposition persists in discussing, almost exclusively, a much broader issue, *not* presented by

[2]To be sure, the Brief in Opposition does contain the startling assertion that "[h]aving eschewed any effort to obtain a permit, petitioner should not be heard to attack the regulation on the ground that the proposed activity would have insubstantial effects on migratory birds." Br. in Opp. at 22-23. This stance, now intruded after ten years of litigation and a fine actually imposed upon a finding of violation, is difficult to understand. It must be stressed that, in practice, permits are not available for the asking and the process of applying is long and expensive. *See, e.g.*, A.C. Brief for the National Association of Home Builders at 10. Even when successful, onerous conditions typically are imposed. Whatever the ripeness of a *taking* claim, there can be no prematurity objection to a defendant in a government enforcement action raising issues of *jurisdiction* without submitting himself to the Corps' permit procedures—which, of course, are inapplicable if jurisdiction is absent.

Cargill, *viz.*: Whether the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, reasonably can be read to embrace some isolated waters, notably a huge, navigable lake such as was involved in *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984). *See* Br. in Opp. at 10-19. We have, it is true, expressed some doubts whether that broader question should be answered in the affirmative. This is not, however, an issue that needs to be resolved in the present case and we have accordingly confined ourselves to asking this Court (like the courts below) simply to rule that the Clean Water Act reasonably cannot be stretched to reach seasonal, *non-navigable* ponds *which cannot support any kind of water commerce* and which have *no other connection with interstate commerce, except only unprompted visits by out-of-state birds.*

As to this narrower question actually presented, the United States is largely silent. And with good reason, for there is nothing in the text of the statute, nor its legislative history, nor its administrative construction before the present case, that remotely supports such an extreme extension of jurisdiction.

a. Obviously insufficient is the Government's continually repeated point that the Clean Water Act seeks to protect waters, at least in part, for the sake of the birds that use them. It simply does not follow that Congress intended to regulate all waters of interest to birds—else there could be *no* exception, even for bird baths and ornamental pools. As we have said, the goal was to establish a federal pollution control program for "*federal*" waters, so limited for perfectly traditional reasons of comity, economy or constitutional doubt. *See* Pet. at 19-20. Of course, *within the zone of coverage*, birds, among other creatures, were intended beneficiaries. But to conclude that isolated wetlands are regulated by the Clean Water Act merely because birds enjoy them (or might do so) is no sounder than to bring swimming pools within the ambit of the law because they supply

an important venue for human water recreation, equally a value mentioned in the Act. *See* 33 U.S.C. § 1251(a)(2).

b. Nor will it do to reiterate—and misread—the Congressional statement that "the term 'navigable waters' be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 1236, 92d Cong. 2d Sess. 144 (1972), quoted in Br. in Opp. at 13. As we have previously said (the Government ignoring our explanation once again), the context of that statement (including the cases from this Court cited in support)[3], makes it plain Congress only meant thereby to indicate it wished to embrace presently or potentially navigable waters, together with their non-navigable "adjuncts." Pet. at 20-21. As the final text suggests, the legislative history of the 1972 Act is crystal clear that Congress was intent on reaching all waterbodies that, under modern law, properly could be brought within the rubric "navigable waters"—but was *not* discarding the concept altogether.[4]

[3]Among the precedents cited are *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-123 (1921); *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-410, 426-427 (1940); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523-525 (1941); and *Utah v. United States*, 403 U.S. 9 (1971). *See* 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell). Needless to say, none of these decisions reaches wholly isolated waters that are not potentially navigable.

[4]Read in context, Congressman Dingell's remark about "'the waters of the United States' in a geographical sense" (*see* Br. in Opp. at 13) is not to the contrary. As the Congressman himself explained, he was merely repudiating the narrow "technical" phrase "navigable waters of the United States" (*ibid.*) so as "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term," to quote this Court's conclusion in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). As the *Riverside* Court pointedly noted, this does not automatically extend coverage to isolated waters and wetlands. *Id.* at 124 n.2, 131 n.8. Certainly, Congressman Dingell did not remotely advert to non-navigable isolated waters: instead, he invoked the cases cited in n.3, *supra*, as exemplifying the "new and broader definition" of "navigable waters" which the Act was adopting. 118 Cong. Rec. 33756-33757 (1972). In any event, we cannot take Congressman Dingell's reference to geography literally since even the Corps' most expansive regulations exempt *some* waters within the United States.

The reference to "constitutional interpretation" is expressly directed to the definition of "navigable waters," not to Commerce Clause powers in general—much less Congressional powers under the Treaty Clause (*see* n.6, *infra*).

c. The claim of legislative ratification in 1977 is wide of the mark. We note that this Court in *Riverside* did not view the legislative proceedings of that year as obviously endorsing the Corps' then recent *isolated* waters regulation. *See* n.4, *supra*. In fact, little, if anything, was actually *spoken* on the floor of either House on that score. But, in any event, it is undeniable that the *migratory bird rule*—the focus of this case—was not ratified in 1977. It could not have been, since it did not yet exist.

d. Equally unavailing is the invocation of 1985 Congressional "Oversight Hearings" to prove that the migratory bird rule was alive and well long before that date. Br. in Opp. at 16. To be sure, after unrelenting pressure, Assistant Secretary Dawson finally stated that "the Corps of Engineers generally does accept the notion." *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 168 (1985). But this was after many earlier equivocations or denials. *E.g.*, *id.*, at 37, 52-53, 61, 114-116, 122, 126-127. And the statement as to current practice was at least once recanted. *Id.*, at 171-172. The fact is that there was no earlier reported instance of the Corps applying the migratory bird rule. Indeed, in this very case, it was not invoked at the outset. Certainly, the Subcommittee that

called the 1985 Oversight Hearings was of the view the Corps was *not* applying any migratory bird rule. *See id.* at 114, 122, 129, 160, 168-169, 193-194.

Moreover, if the rule was already in effect, why was it necessary for the Chief of Engineers to send out a directive about it to all Corps Districts in late 1985 (*see Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989))? Or for the Corps to announce the rule as a new "clarification" in the preamble commentary published with the new Regulations in early 1986 (51 Fed. Reg. 41,217)? To pretend that the migratory bird rule, in any form, predated the 1985 Hearings is disingenuous.

e. Finally, it is only by misrepresenting the statutory question actually presented that the Solicitor General is able to evade our submission that the Court should construe the Clean Water Act so as to make unnecessary resolution of a serious constitutional question. *See* Br. in Opp. at 18-19. As we have said, Cargill is *not* here seeking to "invalidat[e] the 'other waters' provision in its entirety" (*id.* at 19), but, rather, to invalidate the migratory bird rule alone. The Government has not suggested any reason why we may not so limit our argument. Accordingly, it is wholly beside the point that the *"other waters" regulation*, as a whole, may not be constitutionally vulnerable. At the least, the *migratory bird rule* raises a serious constitutional question, and that is the basis for our invoking the well-settled principle that constitutional issues should be avoided if a reasonable narrowing construction of the statute is available. *See* Pet. at 16-17.

2. **The constitutional question.** For the most part, the Government does not meet our argument invoking this Court's recent decision in *United States v. Lopez*, No. 93-1260 (Apr. 26, 1995). *See* Pet. at 12-16. But it may be useful to rebut the claim again advanced to the effect that

well-established precedents, undisturbed by *Lopez*, vindicate the migratory bird rule. Br. in Opp. at 19-23. That is simply not the case.

We do not question the national interest in protecting migratory birds, which justifies international treaties to that end (*see Missouri v. Holland*, 252 U.S. 416 (1920)), or the propriety of expending federal funds to acquire and preserve wetlands important to their survival (*see North Dakota v. United States*, 460 U.S. 300 (1983)). Nor do we dispute that the Commerce Clause reaches the man-initiated interstate movement of migratory wildlife for commercial purposes (*see Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979); *Maine v. Taylor*, 477 U.S. 131 (1986).) And we may concede, arguendo, the power of Congress to enact a law expressly protecting the essential habitat of rare species, or game birds, that attracts out-of-state observers or hunters, or the habitat of commercially valuable species destined for interstate markets. Concededly, Congress itself has passed no such statute and it is doubtful whether it could, by giving a wholly blank check to the enforcing agencies, authorize them to write such a regulation. But, in any event, the migratory bird rule at issue here is not so circumscribed. Nor is that the factual setting of the present case.

We are dealing here with a rule that purports to reach waters of no conceivable commercial value solely on the basis that they are visited, not by out-of-state ornithologists or bird-watchers or hunters, but by any migratory bird, typically non-commercial species, unaided and uninfluenced by man.[5] As the author of the *Riverside* opinion observed,

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[5] A sufficient proof that the migratory bird rule does not, sub silentio, include any human element is its insistence that the operative birds must themselves cross state or national boundaries. Plainly, the jurisdictional predicate and the constitutional theory is that the *birds'* movement supplies the interstate or foreign commerce link.

there is no precedent in this Court for extending the Commerce power so far. Tr. of Oral Arg. in *United States v. Riverside Bayview Homes, Inc.*, No. 89-701 (Oct. 16, 1985) at 21-22. As we elaborate in the Petition (at 12-16), the teaching of *Lopez* is that it would be a perversion of the Commerce Clause to condone such a result by "pil[ing] inference upon inference." *Id.*, slip op. at 19.[6]

3. **The administrative law question.** On this issue, the Solicitor General wholly fails to answer our submission (Pet. at 23-24) and there is, accordingly, little to be said in reply. Two points are worth noting, however.

a. We have already shown that the migratory bird rule was newly minted in late 1985, as a product of the Oversight Hearings of that year. Our contention is that, as a substantive change of law, the Administrative Procedure Act, 5 U.S.C. § 553, required that it be offered for public comment before becoming effective. Whether the violation ought to be dated from November, 1985, when the Chief of Engineers directed all Corps Districts to apply the new rule, or March 1986, when the migratory bird rule was first published in the Federal Register, is immaterial.

b. The Government's attempt to downgrade the conflict of decisions on this issue is unpersuasive. *See* Br. in Opp. at 26-27. The Fourth Circuit ruling in *Tabb Lakes* invalidating

[6]The belated and half-hearted invocation of the Treaty Clause in the Brief in Opposition (at 23-24 n.18) is unavailing. Although the 1986 Preamble commentary announcing the migratory bird rule (51 Fed. Reg. 41,217) speaks of treaty-protected birds, as well as birds that cross state lines, the commentary is expressly intended to "clarify" a regulation (33 C.F.R. § 328.3(a)(3), quoted in Br. in Opp. at 5 n.4) that is predicated solely on a connection with "interstate or foreign commerce." Thus, the reference to treaty-protected birds must be understood as embracing birds that cross international boundaries and thereby invoking the notion of foreign commerce. Nor is there a single mention of the Treaty Clause in the legislative history of the Clean Water Act.

the migratory bird rule as violating the APA is unequivocal. It is no less so because it is "split" and has not been officially published. As the Government long ago recognized, the upshot is that the reach of the Clean Water Act is significantly different in the Fourth Circuit than in the Ninth. *See* No. 90-792, Pet. App. at A-46 to A-49. That is the reality that calls for resolution of the conflict by this Court.

4. **The penalty question.** Here, again, the Solicitor General does not confront our primary argument: that "shall be liable to" a monetary penalty is *not* equivalent to "shall be assessed" a penalty. Three points, however, merit a brief reply.

a. As the Government partially recognizes (Br. in Opp. at 28 n.23), the Fourth Circuit cases do *not* accept the mandatory penalty rule endorsed by the Eleventh Circuit and now the Ninth. That more flexible position is most recently confirmed by the opinion in *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 697 (4th Cir. 1989), cited in our Petition, but ignored by the Government. Thus, as it seems to us, there *is* a present inter-circuit conflict on this issue.

b. The Solicitor General too quickly waives aside the statements by *this* Court at odds with the inflexible mandatory penalty rule endorsed below. *See* Pet. at 25-26. Dicta, repeated in three decisions here, cannot so easily be dismissed.

c. Finally, it is said the issue has little practical importance because of broad judicial discretion. Br. in Opp. at 29. This is passing strange when one remembers that, in this very case, the Government was most insistent that the district court should hold itself bound to assess a penalty, provoking a separate proceeding to resolve that question. Moreover, the relaxed attitude now assumed is inconsistent with the stance taken by the Government in other cases to

the effect that judicial discretion in the matter of civil penalties is severely curtailed by the 1987 Amendments to the Clean Water Act and that any assessment below the statutory maximum must be justified by a finding particularizing the mitigating factors listed in the new law. Cf. EPA's December 14, 1990 Guidance on "Clean Water Act Section 404 Civil Administrative Penalty Actions" (which, despite its title, "should also be used to calculate judicial penalty" (at 1)); EPA's Mar. 1, 1995, "Interim Clean Water Act Settlement Penalty Policy."

For the reasons stated here and in the Petition, certiorari should be granted.

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SUPREME COURT OF THE UNITED STATES

CARGILL, INCORPORATED *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–73. Decided October 30, 1995

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting.

This case questions whether the Army Corps of Engineers can, under the Clean Water Act, constitutionally assert jurisdiction over private property based solely on the actual or potential presence of migratory birds that cross state lines. I dissent from the denial of certiorari in this case.

Petitioner, the successor in interest to Leslie Salt Company, owns a 153-acre tract of land southeast of San Francisco. Across the highway is the San Francisco Bay National Wildlife Refuge, which was created when the United States condemned land previously owned by petitioner. In approximately 1919, the predecessor of Leslie Salt began manufacturing salt on the property. To facilitate salt production, Leslie Salt dug pits on dry ground to collect calcium chloride and dug shallow basins to crystallize salt. These basins lie on approximately 12.5 acres of the tract. Leslie Salt discontinued salt production in 1959.[1] Since then, the area has been

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[1] After 1959, the crystallizing basins remained generally void of vegetation due to the compaction and high salinity of the soil. The dry and barren condition of the basins created a dust problem, and, as a result, Leslie Salt was cited for air pollution violations. To prevent further citations, Leslie Salt subsequently plowed the basins in 1983 and 1985 to loosen the soil and create conditions more hospitable to plant growth. Ironically, Leslie Salt's actions to avoid citation for air pollution helped create the conditions that later

dry most of the year, but, during the winter and spring, rainwater occasionally creates temporary ponds. In 1985, Leslie Salt began digging a feeder ditch and a siltation pond on its property and began discharging fill material that affected the basins. After learning of Leslie Salt's activities, the Corps issued a cease and desist order under the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. §1251 *et seq.* (1988 ed.). Leslie Salt filed suit challenging the Corps' jurisdiction over its property.

The United States District Court for the Northern District of California originally found that the Corps lacked jurisdiction over the land, but the Ninth Circuit Court of Appeals reversed and remanded for a determination whether the presence of migratory birds created a sufficient connection to interstate commerce to sustain Corps jurisdiction. *Leslie Salt Co.* v. *United States*, 896 F. 2d 354 (1990), cert. denied, 498 U. S. 1126 (1991). On remand, the District Court held that the presence of migratory birds on the property did create a sufficient connection to interstate commerce to permit Corps regulation, and the Court of Appeals affirmed. *Leslie Salt Co.* v. *United States*, 55 F. 3d 1388 (CA9 1995). Petitioner seeks review of this ruling. I would grant certiorari to resolve whether the potential or occasional existence of migratory birds on petitioner's property creates a sufficient nexus with interstate commerce to permit Corps regulation of these lands.

The Clean Water Act prohibits the discharge of any "pollutant"—including dredged or fill materials—into "navigable waters" without a permit from the Corps. 33 U. S. C. §§1311(a), 1344(a), 1362(12). "Navigable waters" are defined in the Clean Water Act as "waters of the United States." §1362(7). The Clean Water Act does not further define the waters to which Corps jurisdiction extends. Instead, the Corps has promulgated

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subjected it to penalties under the Clean Water Act.

regulations defining the "waters of the United States" as:

> "(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
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> . . . . .
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> "(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." 33 CFR §328.3(a) (1995).

In the preamble to regulations promulgated in 1986, the Corps further suggested that "waters of the United States" includes waters:

> "a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
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> "b. Which are or would be used as habitat by other migratory birds which cross state lines . . . ." 51 Fed. Reg. 41217.[2]

Only last Term, we held that possession of a firearm in a local school zone does not substantially affect interstate commerce. *United States* v. *Lopez*, 514 U. S. ___ (1995). The basis asserted to create federal jurisdiction over petitioner's land in this case seems to me to be even more far-fetched than that offered, and rejected, in *Lopez*. At least in *Lopez* the Government could assert that the presence of weapons in and around schools may

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[2]These regulations presumptively exclude "settling basins" from the Corps' definition of "waters of the United States." 51 Fed. Reg. 41217 (1986). I find it strange that Leslie Salt could have filled in its settling ponds without Corps regulation if it had still been using them in salt production, but cannot now that it has abandoned the production of salt.

result in violent crime that affects education and, hence, the economy. See *id.*, at ___ (slip op., at 15–16). In this case, the Corps' basis for jurisdiction rests entirely on the actual or potential presence of migratory birds on petitioner's land. In light of *Lopez*, I have serious doubts about the propriety of the Corps' assertion of jurisdiction over petitioner's land in this case.

It is undisputed that the occasional rainwater ponds at issue in this case have never been, are not now, and probably will never be susceptible to use in interstate or foreign commerce. The "other waters" provision of 33 CFR §328.3(a)(3) does not require that an activity substantially affect interstate commerce, only that the activity "*could* affect interstate or foreign commerce." (Emphasis added.) In keeping with the "could affect" test, the so-called "migratory bird rule" extends the Corps' regulatory jurisdiction over any waters that might serve as a potential habitat for "migratory birds which cross state lines." 51 Fed. Reg. 41217 (1986).

Apparently, the Corps' regulations are based on the assumption, improper in my opinion, that the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds. As the Court of Appeals admitted, the Corps' expansive interpretation of its regulatory powers under the Clean Water Act may test the very "bounds of reason," 55 F. 3d, at 1396, and, in my mind, likely stretches Congress' Commerce Clause powers beyond the breaking point.

This case is not like *Andrus* v. *Allard*, 444 U. S. 51 (1979), relied on by the Government, which upheld a ban on the sale of bald or golden eagles or any part thereof. The eagle feathers at issue in *Allard* were actually items of interstate commerce, not simply airborne interstate travelers. *Id.*, at 54. Similarly misplaced is the Court of Appeals' reliance on *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979), a case involving

interstate transportation of minnows for commercial purposes.

Both the Court of Appeals and the Government rely on the Seventh Circuit's declaration of an interstate nexus in *Hoffman Homes, Inc.* v. *EPA*, 999 F. 2d 256, 261 (1993): "Throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds." That is no doubt true, and I do not challenge Congress' power to preserve migratory birds and their habitat through legitimate means. However, that substantial interstate commerce depends on the continued existence of migratory birds does not give the Corps *carte blanche* authority to regulate every property that migratory birds use or could use as habitat. The point of *Lopez* was to explain that the activity on the land to be regulated must substantially affect interstate commerce before Congress can regulate it pursuant to its Commerce Clause power.

The record in this case demonstrates that migratory birds do visit petitioner's seasonal rainwater ponds. But there was no showing that humans ever went to petitioner's property to hunt, trap, or observe migratory birds. Indeed, as far as the record reveals, the only persons ever to visit petitioner's property in connection with migratory birds were the Government's experts. The record further suggests that the habitat itself was the product of industrial land use and that petitioner's attempts to remedy air pollution violations made the temporary ponds more hospitable to migratory birds. There was no indication that petitioner's activities would harm any birds or affect the wildlife refuge across the road.

Other than the occasional presence of migratory birds, there was no showing that petitioner's land use would have any effect on interstate commerce, much less a substantial effect. Nor was there any showing that the cumulative effect of land use involving seasonal standing water—water that is wholly isolated from any water

used, or usable, in interstate commerce—would have a substantial effect on interstate commerce.

This case raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the Clean Water Act that provide a compelling reason to grant certiorari in this case. These questions were left open in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985), and should now be resolved.

I respectfully dissent.